Edinburgh, March 18. 1684.

IT *is ordered by the Lords of His* Majeſties *moſt honourable Privie Council, That none ſhall Re-Print, or Import into this Kingdom, the Book intitutled,* The Inſtitutions of the Laws of *SCOTLAND*; *by Sir* George Mackenzie *of* Roſehaugh, *His* Majeſties *Advocat, for the ſpace of nineteen years, after the date hereof, without the conſent of the Author; under the pain of confiſcation of the whole Copies to* John Reid *Printer of the ſaid Book. Extracted by me*

Pat. Menzies, *Cls. Sti. Cli.*

Edinburgh, March 18. 1684.

IT *is ordered by the Lords of His* Majeſties *moſt honourable Privie Council, That none ſhall Re-Print, or Import into this Kingdom, the Book intitutled,* The Inſtitutions of the Laws of *SCOTLAND*; *by Sir* George Mackenzie *of* Roſehaugh, *His* Majeſties *Advocat, for the ſpace of nineteen years, after the date hereof, without the conſent of the Author; under the pain of confiſcation of the whole Copies to* John Reid *Printer of the ſaid Book. Extracted by me*

Pat. Menzies, *Cls. Sti. Cli.*

THE INSTITUTIONS OF THE LAW OF SCOTLAND

Z-16-10

By Sir *George Mackenzie*, of *Rosehaugh*, His MAJESTIES Advocat.

EDINBURGH,

Printed by *John Reid*, *Anno DOM.* MDCLXXXIV.

MUNIFICENTIA REGIA 1715
GEORGIUS D.G. MAG. BR. FR. ET HIB. REX FID.
J. Pine
sculp

1455 ; 14

To the Earl of

MIDDLETON,

My Lord,

THE *Natural way of Learning all Arts and Sciences, is to know, First, the Terms uſed in them, and the Principles upon which they are founded, with the Origins of the one, and the Reaſons of the other. A Collection of theſe Terms and Principles is in Law called,* Inſtitutions; *and the Natural and Eaſie way of Writing theſe, is by going*

from the firſt Principle to a ſecond, and from that to a third: The admir'd Method of Euclid *in his Elements, though much neglected by all, who have written* Inſtitutions of Law; *in which, not onely many things unneceſſary are inſert, as almoſt all the third book of* Juſtinians Inſtitutions; *the Differences betwixt the* Sabiniani *and* Proculiani, &c. *Many Fundamental Titles are ommitted, as all the matter of* Reſtitutions: *And many things are taught in the firſt Book, which cannot be underſtood till the fourth be read.*

I have therefore in theſe my Inſtitutions *treated nothing ſave Terms, and Principles, leaving out nothing that is neceſſary, and inſerting nothing that is contraverted; in all which I have proceeded, building alwayes one Principle upon another;*

and

and expreſſing every thing in the Terms of the Civil Law, *or in the Stile of* Ours *reſpectively; ſo that if any Man underſtand fully this* Little Book; *Natural Reaſon, and Thinking, will eaſily ſupply much of what is diffuſed, through our many Volums of Treatiſes, and Deciſions; Whereas the ſtudying thoſe, would not in many years give a true Idea of our Law; and does rather diſtract than inſtruct. And I have often obſerved, that moe* Lawyers *are ignorant for not underſtanding the firſt Principles, than for not having read many Books; as it is not the having travelled long, but the having known the way, which brings a man to his Lodging ſoon, and ſecurely.*

My Lord, You obſerv'd very juſtly to me, that Inſtitutions *are a* Grammar; *and therefore,*

(which is a great encouragement to all Readers of Inſtitutions, *) they who underſtand the Inſtitutions of any one Nation, will ſoon learn the Law of any other: For though Terms, Forms, and Cuſtoms differ; yet the great Principles of Juſtice and Equity are the ſame in all Nations. I ſend mine therefore to your Lordſhip, not becauſe you need them, but that you may judge, if my* Inſtitutions, *will be able to juſtifie your parallel.*

Nec Phœbo gratior ulla eſt,
Quam ſibi quæ *Vari* præſcripſit pagina Nomen.

The

The INDEX of the TITLES.

PART I.

Title		Page
I.	*Of Laws in General*	1
II.	*Of Juriſdictions, and Judges in general*	9
III.	*Of the Supream Judges, and Courts of* Scotland	17
IV.	*Of inferiour Juriſdictions and Courts*	27
V.	*Of Eccleſiaſtick Perſons*	33
VI.	*Of Marriage*	46
VII.	*Of Minors, and their Tutors and Curators*	47

PART II.

Title		Page
I.	*Of the Diviſion of Rights, and the ſeveral wayes of acquiring Property and Dominion*	74
II.	*Of the difference betwixt Heri-*	

Title Page
Heritable, and Moveable Rights 83
III. *Of the Conſtitution of Heritable Rights, by Charter and Seaſin* 92
IV. *Of the ſeveral kinds of Holding*
V. *Of the Caſualities due to the Superiour* 108
VI. *Of the Right which the Vaſſal acquires by getting the Feu* 13
VII *Of Tranſmiſſion of Rights by Confirmation, and of the difference betwixt Baſe and Publick Infeftments* 14
VIII. *Of Redeemable Rights* 15
IX. *Of Servitudes* 16
X. *Of Teynds* 18
XI. *Of Inhibitions* 19
XII. *Of Compryſings and Adjudications* 20

PART

PART *III.*

Title		Page
I.	*Of Obligations and Contracts in general*	217
II.	*Of Obligations by Write, or Word*	228
III.	*Of Obligations and Contracts, ariſing from Conſent, and of acceſſory Obligations*	232
IV.	*Of the Diſſolution or Extenſion of Obligations*	255
V.	*Of Aſſignations*	261
V.	*Of Arreſtments and Poindings*	265
VI.	*Of Preſcriptions*	275
VII.	*Of Succeſſion in Heritable Rights*	282
VIII.	*Of Succeſſion in Moveables*	323
IX.	*Of laſt Heir and Baſtards*	330

PART *IV.*

Title		Page
I.	*Of Actions*	334
II.	*Of Probation*	362
III.	*Of Sentences and their Execution*	368
IV.	*Of Crimes*	375

THE

THE INSTITUTIONS Of the Law of SCOTLAND.

FIRST PART.

Tit. I.

Of Laws in General.

JUSTICE, *is a conſtant and perpetual Will, and Inclination to give every Man what is due to him.*

LAW, *is the* Science *which teacheth us to do* Juſtice.

This *Law*, in a large acceptation, is divided, In the *Law of Nature*, *Law of Nations*, and the *Civil*, and *Municipal Law* of each particular Countrie.

Part 1. Tit. 1.

The *Law of Nature* comprehends thoſe Dictats, which Nature hath taught all living creatures, inſtances whereof are *Self Defence*, *Education of Children:* and generally, all thoſe common principles, which are common to Man, and beaſts, and this is rather *innate inſtinct*, than *poſitive Law.*

The *Law of Nations*, is peculiar to *Man-kind* onely, dictated by right Reaſon, and is divided into the *Original* and *primarie Law of Nature*, that flows from the firſt and pureſt principles of right Reaſon; Such as Reverence to GOD, reſpect to our Country, and Parents. And the *ſecundarie*, and *conſequential Law of Nature*, conſiſting of theſe general concluſions, in which ordinarly all Nations agree, and which they draw by

by way of neceſſary conſequence, from thoſe firſt principles. And under this part of the *Law of Nations*, are comprehended, the *Obligations* ariſing from *promiſes*, or *contracts*, The liberties of *Commerce*, the ranſoming of *Priſoners*, ſecuritie of *Ambaſſadours*, and the like.

Civil, or *Municipal Law*, are the particular Laws, and Cuſtomes of every *Nation*, or *people*, who are under one *Soveraign Power*.

The *Romans*, having ſtudied with great *exactneſs*, the principles of *Equity*, and *Juſtice*. Their Emperour *Juſtinian*, did cauſe digeſt all their Laws into one body, which is now called by moſt *polit Nations*, (for its Excellency) the *Civil Law*; And as this *Civil Law* is much reſpected generally, ſo it has great influence in *Scotland*, ex-

Part 1. Tit. 1.

cept where Our own expreſs *Laws*, or *Cuſtomes*, have receded from *it. And by the common Law in our *Acts of Parliament* is meant the * *Civil Law*.

*K.J. 6 Par. 8. Act 131

*K. Ja. 4. Par. 4. Act 51. K. Jam. 5. Par. 6 Act 80. Q. Mary Par. 5. Act 22. K. Ja. 6 Par. 1. Act 31.

The *Popes of Rome*, in Imitation of the *Civil Law*, made a *body of Law*, of their own; which, becauſe it was compiled by *Church men*, it was called, *The Cannon Law*; And though it has here no poſitive *Authoritie*, as being compiled by private Perſons, at the deſire of the *Popes*, eſpecially ſince the *Reformation*; yet our *Eccleſiaſtick Rights*, were ſettled thereby before the *Reformation*: And becauſe many things in that *Law*, were founded upon *material juſtice*, and exactlie calculated for all Church men; Therefore, that *Law* is yet much

much reſpected among us, Eſpecially in what relates to *conſcience, and Eccleſiaſtick Rights.* Part 1. Tit. 1.

Our *Municipal Law* of *Scotland*, is made up partly of our *written*, and partly of our *unwritten Law:* Our *written Law* comprehends, firſt, our *Statutory Law*, which conſiſts of our *Statutes*, or *Acts* of *Parliament*. *Secundo*, The *Acts* of *Sederunt*, which are *Statutes*, made by the *Lords* of *Seſſion*, by vertue of a particular *Act of Parliament*, * impowering them, to make ſuch conſtitutions as they ſhall think fit, for ordering the *procedur*, and *forms* of *Adminiſtrating juſtice*, and theſe are called *Acts of Sederunt*; becauſe they are made by the *Lords* ſitting in judgement; But are not properly *Laws*, the *legiſlative power* being the

*K. Ja. 5. Par. 7 & 93.

Part 1. Tit. 1.

Kings Prerogative. Tertio, The books of *Regiam Majeſtatem*, which are generally looked upon as a part of *Our Law*, and they, and the *leges burgorum*, and the other tractates, joyned by *Skeen* to them, are called the *old books of Our Law*, by many expreſs *Acts of Parliament* *. Tho the books of *Regiam Majeſtatem*, were originally but the works of one private *Lawyer*, writing by way of Inſtitution, and are now very much abrogated by Cuſtome.

*K. Ja. 1 par. 3. Act 54. K. Ja. 3. Par. 14. Act 115

Our *unwritten Law*, comprehends the conſtant tract of deciſions, paſt by the *Lords of Seſſion*, which is conſidered as *Law*; the *Lords* reſpecting very much their own *deciſions*; And though they may, yet they uſe not to reced from them, except

except upon grave conſiderations. *Secundo*, Our *Ancient cuſtomes*, make up a part of our *unwritten Law*, which have been univerſally received among us. The *tacite conſent* of the people, operating as much in theſe, as their expreſs conſent does, in making *Laws*; And ſuch is the force of *cuſtome*, or *conſuetude*, that if a Statute, after long ſtanding has never been in obſervance, or having been, has run *indeſuetude*; *conſuetude* prevails over the *ſtatute*, till it be renewed either by a ſucceeding *Parliament*, or by a *Proclamation* from the *Council*: For though the *Council* cannot make *Laws*, yet they may *revive them.* Part 1. Tit. 1.

Generally, all *Laws* ſhould look foreward † though *declaratory Laws* regulat what is paſt, ſince their de- †K. Ja. 6 par. 3. Act 18.

Part 1. Tit. 1.

ſign is, to declare what was *Law prior* to the ſtatute, and to direct *Judges*, how to decide in caſes that needed the *deciſion* of a *Parliament*.

Laws ſhould command, not perſwade; and though the *rubrick* (or title) and *narrative* of the *ſtatute*, may direct a doubting *Judge*, yet if the *ſtatutory words* be clear, they ſhould be followed in all caſes.

All *Laws* ſhould be ſo interpreted as to evite abſurdities; and as may beſt agree with the mind of the *legiſlator*, and *Analogie*, or general deſign of the common *Law*.

Correctory Laws (ſo we call theſe which abrogate, or reſtrict former Laws) are to be ſtrictly interpreted, for we ſhould reced as little as can be from received Laws.

Favour-

favourable Laws are to be extended, and the Paritie of Reaſon, often prevails with our *Judges*, to extend Laws to Caſes, that are founded on the ſame reaſon, with what is expreſly determined by the Statute. Part 1. Tit. 2.

Tit. II.

Of Juriſdiction, and Judges in General.

HAving reſolved to follow *Juſtinians* method, (to the end, there may be as little difference found, betwixt the *Civil Law*, and *Ours*, as is poſſible: And that the Reader may not be diſtracted, by different methods) I do reſolve, firſt, to lay down what concerns the Perſons of

Part 1. Tit. 2.

whom the *Law* treats: *Secundo*, what concerns the things themselves treated of, such as rights, obligations, *&c. Tertio*, The actions whereby these rights are pursued, which answers to the *Civilians*, *objecta juris*, *viz. Personæ*, *res*, *& Actiones*.

The Persons treated of in *Law*, are either *Civil* or *Ecclesiastick*, the chief of both which are *Judges*, with whom we shall begin. And for the better understanding of their Office, it is fit to know, that *Jurisdiction*, *is a power granted to a Magistrate*, *to cognosce upon*, *and determine in causes*, *and to put the sentence or decreet to execution*, *in such maner as either his commission*, *law*, *or practice does allow*.

*K.Ch. 2. Par. 1 Act. 2. Par. 3. Act 18.

All *Jurisdiction* flows originally from the *King* * so that none

none have power to make *Deputs*, except it be containd in their *commiſſion*; And if a *Depute*, appoint any under him, that *ſub-depute* is called properly a *ſubſtitute*; and every *Judge* is anſwerable for the *Malverſation* of his *depute*. Part 1. Tit. 2.

Juriſdiction is either *Cumulative*, or *Privative*; *Cumulative juriſdiction*, is when two Judges, have power to judge the ſame thing; And generally, it is to be *remembred*, that the *King* is never ſo denuded, but that he retains an *Inherent power*, to make other Judges, with the ſame power that he gave in former **commiſſions*; And thus he may erect lands, in a *regality*, within the bounds of an heritable *Sheriff-ſhip*, and *burghs Royal*, within the bounds of a *regality*; And theſe bounds *K.C. 2 par. 3.

Part 1. Tit. 2.

bounds, within which, a Judge may exerce his *commiſſion*, is called his *Territory*; ſo that if any Judge exerciſe *Juriſdiction*, without his *Territory*, his ſentence is null: and among thoſe who have a *Cumulative Juriſdiction*, he who firſt cites, can only Judge; and this is called, *jus Prævention is*.

Privative Juriſdiction, is when one Judge has the ſole power of judging, *excluſive* of all others; ſuch power have the *Lords of Seſſion*, in judging of all *Competitions*, amongſt *heritable rights*, and here there can be no prevention.

Juriſdiction, is founded to any Judge, either, becauſe the defender dwels within his *territory*, which is called, *Sortiri forum ratione domicilij*: or *Secundo* Becauſe, the crime was committed

mitted within his *territory*, which is called *ratione delicti*; or *Tertio*, If the Perſon purſued, have any immovable eſtate, within his *territory*, though he live not within the ſame, he may be purſued by any action to affect that eſtate, which is called, *ſortiri forum ratione rei ſitæ.* Part 1. Tit. 2.

A *Juriſdiction*, is ſaid to be prorogate, when a perſon not other wayes ſubject, ſubmits himſelf to it, as when he compears before an incompetent Judge, and propons defences.

All Judges with us, muſt take the *Oath of Allegiance*, * and the *Teſt*; ‡ whereby they ſwear, *to maintain the Government of Church and State, as it is now eſtabliſhed*; and an oath *de fideli adminiſtratione*, before they exerce their Office, And

*K.C.2 Par. 1. Seſſ. 1, Act 11.
‡ par. 3 Act 18.

no

Part 1. Tit. 2.

no excommunicate perſon, nor rebell againſt the Government, can Judge by Our Law.

If a perſon be purſued before a Judge, who is not competent, he may complain to the *Lords of Seſſion*, and they will grant *Letters of Advocation*, whereby they *Advocat*, that is to ſay, call that cauſe from the incompetent Judge, to themſelves; And if after the *letters of Advocation* are intimat to that Judge, he yet proceed, his *Decreet* will be null, as given *Spreto mandato.*

Juriſdiction is either *Supream*, *inferior*, or *mixt:* Theſe courts are properly called *ſupream*, from whom there is no appeal to any higher *Judicatory*, ſuch as the *Parliament*, *Privy Council*, *Lords of Seſſion*, the *Criminal*

Criminal Court, and *Exchequer*: Inferior Judges are ſuch? whoſe *decreets*, and *ſentences* are lyable to the *reviewes* of the *ſupream Courts*, as *Sherriffs*, *Stewards*, *Lords of Regality*, Inferior *Admirals*, and *Commiſſars*, *Magiſtrates of Burghs Royal*, *Barrons*, and *Juſtices* of *Peace*. Mixt *Juriſdiction*, participats of the nature, both of the *ſupream*, and *inferior courts*; ſuch a *juriſdiction* have the *high Admiral*, and *Commiſſars*, *of Edinburgh*. Both which are in ſo far *Supream*; that *Maritim Affairs*, and confirmations of *Teſtaments*, muſt come in and be tabled, before the *high Admiral*, and *Commiſſars of Edinburgh*, in the firſt inſtance. As alſo, they both, can reduce the *Decreets* of *inferior Admirals*, and *Commiſſars*; But ſeeing their *Decreets*

Part 1. Tit. 2.

creets are ſubject to the review, of the *Lords of Seſſion*, they are in ſo far inferior Courts.

No inferior *Judge*, can *judge* in the cauſes of ſuch as are *Cuſin-germans* to him, or of a nearer degree, either of *affinity*, or *conſanguinity*; But there is ſo much truſt repoſed in the *Lords of Seſſion*, that by a ſpecial *K. J. 6. par. 14. Act 212 * *Statute*, they can only be declined incaſes relating to their Fathers, Brothers, Sons, Nephews, or Uncles; which by a late *ſtatute**, is likewiſe extended to the degrees of *affinity*, and *K. C. 2 par. 3. Act 13. to the *Lords of privy Council*, and *Exchequer*, and the *Commiſſioners* of *Juſticiary*, and to all other *Judges* within the *Kingdom*.

The members of the *Colledge of Juſtice*, have this priviledge, that they cannot be purſued before any *inferior judge*

Judge; and if they be, the *Lords* will *Advocate* the cauſe to themſelves. Part 1. Tit. 3.

Tit. III.

Of the Supream Judges, and Courts of SCOTLAND.

THE *King*, is the *Author*, and *Fountain*, of all power, and is an *abſolute Prince*, having as much power, as any King, or Potentate, whatſoever, *deryving his power from GOD Almighty alone *, and ſo not from the people. The ſpecial priviledges that he has, are called, *His Prerogative Royal*; ſuch as, that he only can make *Peace*, or *Warr*, call *Parliaments*, *Conventions*, *Convocations* of the *Clergy*, make *Laws** ; And generally all meetings called without his ſpeciall command are

*K.J.6. Par. 15. Act 251

*K.C.2 Par. 1. Seſſ. 1. Act 5. and 15. Par. 3. Act 2.

* Act foreſaid

Part 1. Tit. 3.

are puniſhable*, he only can remit *crimes*, legittimate baſtards, name *Judges*, and *Councilors*, give tutors *Dative*, and naturalize ſtrangers; And is *Supream over all perſons, and in all cauſes, as well Eccleſiaſtick as Civil* *.

* King Ch. 2. Par. 1. Seſ. 1. Act. 2. * K. Ja. 6. par. 18. Act 1 K. Ch. 1. par. 1. Act 3. K. Ch. 2 par. 2. Seſ. 1. Act 1.

The *Parliament* of old, was only the *Kings Barron Court*, in which all free-holders were oblidged to give ſute, and preſence in the ſame manner, that men appear, yet at other head courts. And therefore, ſince we had *Kings* before we had *Parliaments*, it is rediculous to think, that the *Kings power* flowed from them.

The *Parliament* is called by *Proclamation*, now upon fourty dayes, tho it may be *Adjourned* upon twenty, but of old, it was called by *brieves*, out

out of the *Chancellary*. It conſiſts of *three Eſtates*, *viz.* the *Arch-Biſhops* and *Biſhops*; and before the Reformation, all *Abbots*, and *Mitred-priors*, ſat as *Church men*. *Secundo*, The Barrons, in which eſtate are comprehended, all *Dukes*, *Marqueſſes*, *Earles*, *Viſcounts*, *Lords*, and the *Commiſſioners*, for the Shires; for of old, all Barrons, who held of the *King*, did come; but the *eſtates* of leſſer Barrons not being able to defray this charge, they were allowed to ſend *Commiſſioners* for every Shire. *And generally, every Shyre ſends two, who have their charges born by the Shyre. *Tertio*, The *Commiſſioners* for *Burghs Royal*, each whereof, is allowed one and the *Town* of *Edinburgh* two; Though all the *three Eſtates*

Part 1. Tit. 3.

*K. J. 1. Par. 7. Act 101 K. Ja. 6. Par. 11. Act 113

Part 1. Tit. 3.

Eſtates muſt be cited, yet the *Parliament* may proceed, albeit any one eſtate were abſent, or being preſent would diſaſſent. The *legiſlative power* is only in the *King*, and the *Eſtates of Parliament* only conſent, and in *Parliament*, the *King* has a negative voice, whereby he may not only hinder any Act to paſs, but even any overture to be debated. The *Acts* of *Parliament* muſt be proclaimed upon fourty days, that the *Lieges* may know them*.

* K. Ja. 6. Par. 7. Act. 328.

To ſecure the *Crown* againſt *factions*, and impertinent *overturs* in open *Parliament*: Our *Parliaments* chooſe before they proceed to any *buſſineſs*, four out of each *State*, who with the *Officers of State* determine what *Laws*, or *Overturs*, are to be brought

brought in to the *Parliament*; and they are therefore called, the *Lords of Articles*. Part 1, Tit. 3.

We have another meeting of the *three Eſtates*, called the *Convention of Eſtates*, which is now called upon twenty days, and proceeds in the ſame way that the *Parliament* does, diffreing only from it, in that the *Parliament*, can both impoſe *Taxations*, and make *Laws*; whereas the *Convention of Eſtates*, can only impoſe, or rather offer *Taxations*, and make *Statutes* for uplifting thoſe particular *Taxations*. But can make no *Laws*. And of old, I find by the *Regiſters* of the *Conventions*, (the eldeſt whereof now extent, is in *Anno* 1583.) that the *Conventions of Eſtates* conſiſted, of any number of the *three Eſtates*, called off

Part 1. Tit. 3.

off the Streets, ſummarly by the *King*; And yet they cryed down, or up money, and judged proceſſes, which now they do not.

The *Privy Council* is conſtituted by a ſpecial *commiſſion* from the *King*, and regularly their power extends to matters of publick *Government*; in order to which, they puniſh all Ryots, for ſo we call breach of the peace. They ſequeſtrate *Pupills*, gives aliments to them, and to wives, who are ſeverely uſed by their husbands, and many ſuch things, which require ſuch *ſummar procedour*, as cannot admit of the delays neceſſary before other *courts*; And yet if any of theſe, *dipp* upon matter of *Law*, (for they are only *Judges in facto*,) they remit

remit the *cognition* of it to the *Seſſion*, and ſtop till they hear their report. The *Council* delay *Criminal executions*, and ſometime change one *puniſhment* into another, but they cannot remit *Capital puniſhments*; They may alſo *Adjourn* the *Seſſion*, or any other *court*: It has it's own *Preſident*, who *preceeds* in the *Chancellours* abſence, and it has its own *Signet and Seal*: All who are cited to compear there, muſt be perſonally preſent, becauſe, ordinarly the *purſuer* concluds, that they ought to be perſonally puniſhed. All *dyets* there are peremptor, all *debat* is in writ, no *Advocat* being allowed to plead, becauſe the *Council* only *Judges* in matters of *fact*.

The *Lords* of *Council* and *Seſſion*

Part 1. Tit. 3.

Session, are *Judges* in all matters of *civil Rights*; of old, they were choſen by the *Parliament*, and were a *committy* of *Parliament*: But the preſent *modell* was fixt and eſtabliſhed by *King James the fifth*, after the *modell* of the *Parliament of Paris* *.

*K. Ja. 5. par. 5. Act 36, 37, 38, 39, 40.

Of old it conſiſted of ſeven *Eccleſiaſticks*, and ſeven *Laicks*; and the *Preſident* was a *Churchman*; But now all the fifteen are *Laicks*. And there ſits with them four *Noble--men*, who are called *extraordinarie Lords*; and were allowed to ſit to learn, rather then decide. But now they vote after the *ordinary Lords*. All the *Lords* are admitted by the *King*; and by *Statute* cannot be admitted, till they be twenty five years of *Age, and except they*

*K. Ja. 6. Par. 12. Act 132.

they have a 1000 *lib.* or 20 *Chalders* of *victual* in yearlie rent. Nine are a *Quorum.* Part 1. Tit. 3.

Crimes of old, were *judged* by the *Juſtice General*, *Juſtice Clerk*, and two *Juſtice Deputes*; but now five *Lords of Seſſion*, are joyned to the *Juſtice General*, and *Juſtice Clerk*, and they are called the *Commiſſioners of juſticiary*; Becauſe, they ſit by a ſpecial *commiſſion* only: Four of which number make a *Quorum* in time of *Seſſion*, three in time of *Vacance*, and two at *Circuit Courts* *. *K.C.2 Par. 2. Seſſ. 3. Act 18.

The *Exchequer*, is the *Kings Chamberlain*, *Court* * wherein he judges what concerns his own *revenues*; It conſiſts of the *Theaſurer*, (in whoſe place are ſometimes named *Commiſſioners* of the *Theaſury*,) the *Theaſurer Depute*, and as many of the *Lords of Exchequer*, *K.C.1 par. 1. Act 18.

Part 1. Tit. 3.

as his *Majestie* pleases.

The *High Admiral*, has a *commission* from the *King*, to judge in all *Maritime affairs*, not only in *Civil*, but also in *Criminal* cases, where the crime is committed at *Sea*, or within *flood-mark*; nor can the *Lords of Session Advocat* causes from him *; tho they can reduce his *Decreets*, as he does the *Decreets* of all inferior *Admirals*, or *Admiral Deputes*, for many Heritors are constitute *Admirals*, within themselves, by a right from the *high Admiral*, since his Gift, or from the *King* before it.

*K.C. 2 par. 3. Act 16.

Tit.

Part 1.
Tit. 4.

Tit. IV.

Of Inferior Juriſdictions, and Courts.

THe *Sherriff*, is the *Kings chief* and *Ancient Officer*, for preſerving the *Peace*, and putting the *Laws* in execution *, he has both a *Civil* and *Criminal Juriſdiction*, and his *Commiſſion* is under the *Great Seal*; he is obliged to raiſe the *huy and cry* after all *Rebels*, and to apprehend them when required: To aſſiſt ſuch as are violently diſpoſſeſt: To apprehend ſuch as *ſay Maſs*, or trouble the *Peace*, and take caution for their appearance *: He nor no *Inferior Judge*, can hold Courts in

*K. J. 6. Par. 12. Act 124

*K. C. 2 Par. 1. Seſſ. 3. Act 15.

Part 1. Tit. 3.

time of *Vacance*, in *Civil* caſes, without a diſpenſation from the *Lords of Seſſion*; But in *Criminal caſes*, he needs no *diſpenſation*, becauſe *crimes* ſhould be inſtantly puniſhed.

He is *Judge* in all crimes, Except the four *Pleas* of the *Crown*, to wit, *Murder*, *Fire raſing*, *Robery*, and *raviſhing of Women* *; but murder he can judge, if the *Murderer* was taken with *red-hand*, that is to ſay, *immediately committing the murder*; In which caſe, he muſt proceed againſt him within three *Suns*; And in *Theft*, he may *judge*, if the *Thief* was taken with the *fang*.

* Leg. Mak. 2. Act 11. Quoniam Attach. cap. 79.

The *Shireff*, is alſo *judge competent*, to puniſh *Bloodwits*, for which he may fyne in 50 *pounds Scots*; but no higher, and for *contumacy*, he can fine no higher than 10. *pounds*.

A

A *Lord of Regality*, is he who has the *land* whereof he is *Proprietar* or *Superior*, erected with a *Juriſdiction*, equal to the *juſtices*, in *Criminal caſes*, and to the *Shirreff*, in *civil cauſes*; he has alſo right to all the *moveables* of *Delinquents*, and *rebels*, who dwell within his own *Juriſdiction*, whether theſe *moveables* be within the *regality*, or without the ſame; And becauſe he has ſo great power, therefore no *Regality* can *legally* be granted except in *Parliament*†. Part 1. Tit. 4. †K. Ja. 2. Par. 11. Act 43.

The *Lord of Regality*, has alſo by his erection, power to repledge from the *Sherriff*, and even from the *Juſtices* in all* caſes except *treaſon*, and the *pleas* of the *Crown*, that is to ſay, to appear, and crave; that any dwelling within his *Juriſdiction*, may be ſent back to be *K. Ja. 6. Par. 11. Act. 29.

Part 1. Tit. 4.

judged by him, and he is obliged to find caution, that he ſhall do *juſtice*, upon the *Malefactor* whom he *repledges*, within year and day, and, the *caution* is called *Culreach* *.

* Quoniam Attach, cap. 89.

The *Stewart*, is the *Kings Sherriff*, within the *Kings* own proper Lands, and theſe were erected, where the lands had been erected, before in *Earledoms*, or *Lordſhips*; For elſe the *King* appointed only a *Baillie* in them, and theſe *Juriſdictions* are called *Bailliaries*, the *Baillies* of the *Kings* proper lands having the ſame power with the *Sherriff*. And all theſe, *viz.* the *Sherriff*, the *Stewart*, and the *Lord of Regalitie*, proceed in their *courts* after the ſame way, and each of them, has a *Head Burgh*, where they hold

hold their *courts*, and where all *letters* muſt be *executed* and *Regiſtrate.* Part 1. Tit. 4.

The *Prince of Scotland* has alſo an *Appange*, or *Patrimony*, which is erected in a *Juriſdiction*, called the *Principality*. The revenues comes in to the *Exchequer*, when there is no *Prince*; but when there is one, he has his own *Chamberlain*.

Juſtices of Peace, are theſe who are appointed by the *King, or Privy Council*, to advert to the keeping of the peace, and they are *judges* to *petty ryots*, ſervants fies, and many ſuch like, relateing to good neighbour-hood, expreſt in the inſtructions, given them by the *Parliament** and are named by the *Council*; allbeit, be the foreſaid *Statute*, the *nomination* is to be

* K.C. 2 Par. 1. Act 38.

Part 1, Tit. 3.

by His *Majeſtie*, and His *Royal Succeſſors*, which the *King* has now remitted to the *Privy Council.*

The *Juſtices of peace* do name *Conſtables*, within their own bounds, from ſix months to ſix months; Their *Office is*, to wait upon the *Juſtices*, and receive injunctions from them, delate ſuch *Ryots* and *Crimes* to the *Juſtices*, as fall under their *Cogniſance*, Apprehend all *ſuſpect Perſons*, *Vagabounds*, and *night Walkers*, as is at length contained in their injunctions, given them be the foreſaid *Act.*

Every Heritor may hold *courts* for cauſing his Tennents pay his rent; And if he be infeft, *cum curijs*, he may decide betwixt Tennent and Tennent in ſmall debts, and may judge ſuch as *commit blood*

blood on his own ground; tho his land be not erected in a *barronie*; But if his land be erected in a *barronie*, (which the *King* can only do:) he may (like the *Sherriff*) *unlaw* for *blood-wits*, in 50 *lib.* and for abſence in 10. And if he have power of *Pit* and *Gallows*, he may hang and drown in the ſame manner as the *Sherriff* can. Part 1. Tit. 5.

Tit. V.

Of Eccleſiaſtick Perſons.

SInce the *Reformation*, the *King* is come by *Our Law* in place of the *Pope* *, and all rights to *Kirk-lands*, muſt be confirmed by him, elſe they are null; *. His *Majeſtie* only can call con-

* K. Ja. 6. par. 1. Act 2,

* K. Ja. 6. Par. 9. Act 7

Part 1. Tit. 5.

convocations of the *Clergie*, (for ſo we call our *National aſſemblies* *) and *His Commiſſioners* ſits in them, and has a negative.

*K. Ja: 6. parl. 8. Act 131.

K. Char 2. par. 1. ſeſſ: 1. Act 4. ſeſſ. 3. Act 5.

We have *two Archbiſhops*, and *twelve Biſhops*, and they are thus *elected*, the *King* ſends to the *Chapter* a *Conge de Eſlire*; (which is a *French* word,) ſignifying a *power to elect*, and with it a letter recommending a perſon therein named, And the *Chapter* returns their electing: Whereupon the *Kings* grants a *Patent* to the perſons, and a *mandate* to the *Archbiſhop*, or *Biſhops*, to Conſecrate him: Both which paſs the *great Seal*.

*K:J:6: Par: 22: Act 1. *K.J.6. par. 21. Act 1.

The *Archbiſhops* and *Biſhops*, have the ſole power, of calling *Synods* within their own *Diocies* *, and in theſe, they name the *Brethren* of the conferance:

ferance: Who are like the *Lords of Articles* in the *Parliament*, and by their advice the *Biſhops*, depoſe, ſuſpend, and manage. Part 1 Tit. 5.

Biſhops have their *Chapters*, without whoſe conſent or the *major part*, the *Biſhop* cannot alienate *, which *Major part*, muſt ſign the deeds done be the *Biſhops*; And it is ſufficient if thoſe of the *Chaper*, ſign at any time even after the *Biſhop*; but it muſt be in his lifetime: Nor are *Minors*, or *abſents*, counted; and one having two *benefices*, has two votes; but the Appending of the *Seal*, is by *S*pecial *Statute*, declared to be ſufficient in deeds done be the *Archbiſhop* of St. *Andrews*, without the *Subſcriptions* of the *Chapters* *. * K. Ja. 6. par. 18. Act 3.

* K. Ja. 6. par. 19. Act 8.

A *Perſon* or *Rector Eccleſiæ*, is

Part 1. Tit. 5.

is he who is preſented to the *teiths*, *jure proprio*; But becauſe of *old*, *Parſonages* were beſtowed on *Monaſtries*, therefore they ſent *Vicars*, who ſerved the *cure* for them; and who got a ſhare of the *ſtipend*, for their pains, either *ad placitum*; And they were called *ſimple Vicars*, or for *life*, and they were called *perpetual Vicars*. And after the *Reformation*, the *Churches*, which ſo belonged to them *continued Vicarages* ſtill, The *titular*, who came in place of the *convent*, retaining the right to the *Parſonages duties*.

There were in time of *Poperie*, *Collegiat Kirks* built, and doted by *Kings*, and great men, for *ſinging of Maſs*, which were governed by a *Provoſt*, and ſome for *ſinging*, who were called *prebends*; And becauſe

cauſe, ſome *pariſhes* were wide, ſome were allowed, to build a *chapel* for their *private devotion*; And ſince the *Reformation*, theſe *Chaplanaries*, and *Prebendaries*, are allowed to be beſtowed by the *Patrons*, upon *burſers* in *Colledges*, notwithſtanding of the *foundations* *. Par: 1. Tit. 5.

* K. Ja. 6. Par. 1 Act 12.

For underſtanding all theſe, it is fit to know; that the *Primitive Church*, either to invite men to *build*, or *dote*, or to reward ſuch, as had, did allow ſuch as either had built, or had beſtowed the ground whereon to build, or had *doted a church*, already built, to preſent alone if, they were the only *benefactors*, or by turns, if there were moe, and they were called *Patrons*, or *Advocati*, *Eccleſiarum* according to that,

Patronum

Part 1. Tit. 6.

Patronum faciunt, dos, Ædificatio, fundus.

When a *Church* vaikes, the *Patron* muſt preſent within ſix months, a fit *Perſon* to the *Biſhop*; elſe the right of *preſentation* falls to the *Biſhop*, *jure devoluto*; * but if the *Biſhop* refuſe to admit and collate the perſon preſented, the *Patron* muſt complain to the *Archbiſhop*, and if he alſo refuſe, or delay, the *privy Council* will grant *letters of horning* againſt the *Biſhop*, to receive the *perſon* preſented *, and during the *vacancy* upon that refuſal, the *Patron* may retain the *vacant ſtipends*.

*K. Ja. 6. Par. 2 Act 1.

* Act foreſaid.

Upon this *preſentation* the *Biſhop* cauſes ſerve an *Edict*, on nine dayes; wherein all perſons are after *Divine ſervice*, ad-

advertiſed, to *object*, why, ſuch a man ſhould not be admitted to the *benefice*; And if none *object*, the *Biſhop* confers the *Church and benefice* upon the *Perſon* preſented; and this is called a *Collation*, after which, the *Biſhop* cauſes enter him, who is ſo *collated*, by cauſing give him the *Bible*, and the *Keyes* of the *Church*, and this is called *Inſtitution*, *Preſentation*, gives only *jus ad rem*, and *Inſtitution*, *jus in re*, and is as a *Seaſine*.

If the *Biſhop* be *patron* himſelf, he confers *pleno jure*; and the *preſentation*, and *collation*, are the ſame: *Biſhops* alſo have *menſal churches*, ſo called; Becauſe, they are *de menſa Epiſcopi*, being a part of his *patrimony*, in which he ſerves by his *Viccars*, and *Plants* as *Dioceſſian Biſhop*; and if a

town

Part 1. Tit. 5.

town, or *paroch*, reſolve to make a *ſecond Miniſter*, when they are not *patrons*, he is called, a *Stipendiary Miniſter*, and he is *collated*, and *inſtituted* alſo; but the *patrons* preſentation is ſufficient in *prebendaries*, and other *benefices*, which has not *curam animarum*; And that without the neceſſitie of *Collation*, or *inſtitution*, the *Biſhop* having no other intereſt in the *benefices*, but in ſo far as they concern the *cure of ſouls*.

By *Act of Parliament*, all *Miniſters* muſt have a competent *Stipend*, not below *eight Chalder of victual*, or 800. *merks* or above 1000. *merks* or 10. *chalders of victual*: (Except there be juſt reaſon to give leſs) * together with a *manſe* and *gleib*.

* K. Ja. 6. Par. 22. Act 3.

The *manſe*, *a manendo*, is the place where the *Miniſter* is to dwell, the *Gleib*, from *Gleba*

Gleba terra, is a peece of land for Corn and Fother to his Beaſts: If there was a *manſe* of old belonging to the *parſon*, or *viccar*, the *miniſter* has right to it; If there was none, the *parochiners* muſt build one, not exceeding 1000 *lib.* and not beneath 500 *merks* *, at the ſight of the *Biſhop* of the *Diocie*, or ſuch *Miniſters* as he ſhal appoint, with two or three of the moſt diſcreet men in the *paroch:* as alſo the *Heritors* are lyable to repair the *manſe*; But the preſent *incumbent* is obliged to leave it, in as good *condition* as they gave it to him *.

Part 1. Tit. 5.

* K. Ja. 6 Par. 13 Act 161

The *Miniſters Glieb*, is to comprehend 4 *Acres of Arrable land*, or *ſixteen ſowms-graſs*, where there is no *arrable land*, which is to be deſigned out of the lands, which belonged of old

* K. Ja. 6 Par. 21 Act 8.

Part 1. Tit. 5.

old to *Abbots*, *priors*, *Biſhops*, *Friers*, or any other *Kirk-lands* within the *pariſh* *; with freedom of *foggage*, *paſturage* for a *horſe*, and two *cows*, *fewel feal*, and *divot*, which *Gleibs* are to be deſigned be *Miniſters*, named by the *Biſhop*, with the advyce of two of the moſt honeſt and godly of the *pariſhoners*, and the deſignation is to be ſigned be the deſigners *.

* King James 6 Par. 3. Act 48.

* King James 6 par: 11: Act 161

If a *Biſhop* or *Miniſter*, be *conſecrated*, *tranſlated*, or *entered*, to his benefice, before *Whitſonday*; he has right to the whole years fruits, becauſe they are then preſumed to be fully ſown, and if he be depoſed or *tranſported* before *Whitſonday*, for that ſame reaſon he hath no part of that year; But if he ſerve the *cure* a while after *Whitſonday*, and be

be *tranſported* or *depoſed* before *Michalmas*, he hath the half of that years *Stipend*; and if he ſerve till after *Michalmas*, he hath the whole years. So that the *legal terms* of benefices are *Whitſonday*, at which time the *ſowing* is ended; and *Michalmas*, at which time the fruits are reaped. Part 1. Tit. 5.

They have likewiſe right to the *Annat* after their death, which was introduced by the *Cannon Law*, and by a ſpecial *ſtatute* with us, is declared to be half a years rent of the beneſice, or ſtipend, over and above what is due to the *defunct*, for his *incumbancie*; So that if he ſurvive *Whitſonday*, he has the half of that year for his *incumbencie*, and the other half a *Annat*, and if he *ſurvive Michalmas*, he has the half of the next year for his *Annat*. *King Charles 2: par. 2 ſeſſ: 3: Act 13.*

There

Part 1. Tit: 5.

There is a *committie of Parliament*, alwayes ſitting, called the *commiſſion for plantation of Kirks*, or *Valuation of teinds*, (conſiſting of ſo many of every *eſtate of Parliament* ;) who have power to modifie, and augment *Miniſters Stipends*, and to unite and disjoyn *churchs*, *&c.* whoſe decreets; becauſe they are a *commitie of Parliament* cannot be reduced by the *Seſſion*, or any other *inferior Judicature.*

The *Primitive Chriſtians* remitted the *cognition of all caſes* that related to *Religion*, as the matters of *divorce*, *baſtardie*, the protection of dying mens eſtates, to their *Biſhops* ; or ſuch as they imployed, under them, who were called *Officialls*, and with us are called *Commiſſars*; and are called therefore *Judices Chriſtianitatis* :

And

Part 1. Tit. 5.

And they are therefore the only *judges in divorce*; becauſe, it is the *breach of a vow*: And to *ſcandale*, becauſe, it is an *offence againſt Chriſtianity*, and of *teinds and beneſices*; becauſe, theſe are the *patrimony of the Church*: And of all matters referred to *Oath*, (if the ſame exceed not 40 *lib. Scots*) becauſe, an *Oath* is a *Religious tye.*

Every *Biſhop* has his *Commiſſar*, who has his *commiſſion* from the *Biſhop* only; and this extends no further, than the *Conſtituents Diocy.* But the *Archbiſhop of St. Andrews*, has power to name four *Commiſſars*, who are called the *Commiſſars of Edinburgh*; becauſe, they ſit there, and they only are *Judges to divorce upon adultery*, and can only declare *marriages null*, for *impotencie* and to *baſtardy*

Part 1. Tit. 6.

baſtardy, when it has any *connexion* with *adultery*, or *marriage*: And they only may reduce the *ſentences of all inferior Commiſſars* *, though the *Lords of Seſſion* may reduce even their *decreets and ſentences*; They have *inſtructions from the King*, which are their *Rule*. And theſe are likewiſe recorded in the books of *Sederunt of Seſſion*;

* King James 6 Par 29. Act 6.

Tit. VI.

Of MARRIAGE.

Having ſpoken fully of Perſons, as they are conſidered in a Legal ſenſe; We ſhall now treat of Marriag

Marriage, which is the chief thing that concerns Perſons, and their State in Law.

MAarriage is defined to be, the *coniunctoin of Man and Wife, vowing to live inſeparably together, till death.*

By *conjunction*, here, *conſent* is underſtood, *nam conſenſus, non coactus, facit matrimonium.*

Conſent, is either *de futuro* or *de preſenti*, conſent *de futuro*, is a promiſe, to *ſolemnize the Marriage*, which in *Law*, is called *Spouſalia*; and this is not *marriage*; for either party, may reſile, *rebus integris*, notwithſtanding of the *interveening Promiſe*, or *Eſpouſals*, conſent, *de preſenti*, is that in which *marriage* does conſiſt; and therefore, it neceſſarly follows, that none can *marry*, except

Part 1. Tit. 6.

except theſe who are *capable* to conſent, and ſo *Idiots*, *and furious Perſons*, *durante furore*, cannot *marry*, nor *Infants*, who have not attained the uſe of *reaſon:* that is, when they are within the *years of pupillarity*; which is defined in *Law*, to be 14 *years*, in *Males*, and 12 in *Fœmales*, *niſi malitia ſuppleat ætatem.*

The *Law*, in *decencie*, requires the conſent of *Parents*, though a *marriage* without it, is valid, if the perſons *married* be *capable* of conſenting.

By our *Law*, none can *Marry* who are nearer relations than *Couſin germans*; which is ſuitable to the *Judicial Law*, of *Moſes* *, and the ſame degrees porhibited in *Conſanguinity* are alſo forbidden in *Affinity.*

*Levit. chap. 18

Marriage, is either *regular*, and *ſolemne*, or *clandeſtine*; the

K. Ja. 6, Par. 1. Act 1.

regular

regular way of *Marrying*, Is, by having their names proclaim'd in the *Church*, *three ſeveral times*, which we call *Proclamation* of *Banns*, without which, or, a *Diſpenſation* from the *Biſhop*, the *Marriage* is called a *Clandeſtine Marriage*; and the parties are finable for it; but the *Marriage* is ſtill *Valid* *; *Cohabitation* alſo, or *dwelling together*, is preſum'd to be *Marriage* ‡, if the *Parties* were *repute*, Man and Wife, dureing their lifetime, and ſo the *Children* are not *Baſtards*; though they cannot prove that their *Parents* were *Marryed*; unleſs it be clearly prov'd that they *were not Married.*

Part 1. Tit. 6.

* King Charles 2. parl. 1. Seſſ. 1 Act 34.

‡ King James 4 par. 6. Act 77. K Char Par. 2. Act 9. Seſſ. 3.

From the *conjugal Society*, ariſes, the communion of *moveable Goods* betwixt *Man*

Part 1. Tit. 6.

and *Wife*; but the *adminiſtration* thereof during the *Marriage* is ſolly in the *Husband*; which reaches even to *Alienation*, and diſpoſing upon the *Moveables*, at his pleaſure, though they be not diſpon'd to him by her (*Marriage*, being a *Legal Aſſignation*, as to this effect) but he has no further *Right* to her *Heritage*, ſave that he has *Right* to the *Rents* of it, and to *Adminiſtrat* and *Manage* it, during th *Marriage*, and this is called *Jus Mariti*, and is ſo inſepa rable from the qualitie of *Husband*; that he cannot b *Our Law*, *Renounce his Pow of Adminiſtration*, ſo that the are both *Domini*, by this *com muuion*; but the *Husband* ha a *Dominium actu*, and th *Wife* only *habitu*.

The

The *Husband* is lyable dureing the *Marriage* to pay her *moveable debts*; but how ſoon the *Marriage* is diſolv'd, he is no further lyable to pay her *debts*; than in as far as he was a *Gainer* by her *Eſtate*. Part 1, Tit. 6.

If the *Wife contract* any *debt*, or doe any other deed, after the *Proclamation of Banns*, the *Husband* will not be thereby *Prejudg'd*.

The *Husband* is alſo oblig'd to *Aliement his Wife*, and if he refuſe, the *privy Council*, or *Lords of Seſſion*, will modifie an *Aliement* to her out of her *Husbands* means, ſuitable to his *Qualitie*, which they will alſo grant, *ob ſævitiam*, if he treat her *Inhumanely*.

The *Husband* is *Tutor*, and *Curator* to his *Wife*, and therefore, if ſhe had *Tutors*, or

Part 1. Tit. 6.

Curators, formerly, their power is *devolved* over by the *Law* upon the *Husband*; and whatever deeds she does without his consent are *null*, & when she is *Cited*, he must be *Cited* for his *Interest*; or if she *Marries* during the *Dependence* of any *Process*, the samen must upon *Supplication* be continued against him.

Because, the *sole administration*, during the *Marriage* belongs to the *Husband*; *Law* hath secured the *Wife*, that she cannot oblige her self when she is cloathed with the *Husband*, albeit with his consent, and therefore all *Bands* and *Obligations*, granted by a *Wife stante Matrimonio*, are *ipso jure*, *null*; but if she oblige herself, *ad factum prestandum*, she will be *lyable*, as if she should oblig

oblige her ſelf to *Infeft* any *Man* in *Lands* properly belonging to her ſelf. Part 1. Tit. 6.

During the *Marriage*, all *donations* made betwixt *Huſband* and *Wife* are *Revokable*, at any time in their *life*, (except in ſo far as they are *ſuitable proviſions*) leaſt otherwayes, they might *ruine themſelves*, thorow *Love*, *Fear*, or *Importunity*; and that either expreſly, by *Revocking* what is done (though they obliged themſelves not to *Revoke*) or *Tacitly*, by *diſponing to others*, what was ſo *gifted*.

All *Rights* made by a *Wife* to her *Husband*, or any third partie with his conſent and to his behoof, are valid *Rights*; if they be *Ratified* by her before a *Judge*, before whom ſhe is to declare

Par: 1. Tit. 6.

without the preſence of her *Husband*, that ſhe was not compelled to do that deed, and *Swear*, *that ſhe ſhall never quarrel the ſame:* Whereas, if they be not *Ratified*, they may be *quarelled*, as *extorted vi & metu*, or may be *Revoked* as *donatio inter Virum, & Uxorem*, which the *Ratification* before a *Judge* does abſolutely exclude, *Propter Religionem Sacramenti*, the *Ratification*, being *extra preſentiam mariti.*

Marriage is diſolved either by *Death*, or *Divorce*, and if the *Diſolution* of the *Marriage* be by *Death* there is a difference, if the ſamen be within *Year* and *Day* of the *Marriage*, or thereafter; for if either the *Husband* or the *Wife* die within the *Year*, all things done in *tnitu Matrimonij*, become void

and

and return to the ſame *condition* they were in before the *Marriage*; except there be a *living Child*, *Procreat* of the *Marriage*, who was heard *cry*.

If the *Marriage* be diſolved by *Death*, after the *Year expyres*, then the *Wife ſurviving*, has right to a *third* of the *moveable Eſtate*; if there be *Children*; and to the half, if there be none, and this is called *jus Relictæ*; and tho this *Right* does not hinder the *Husband*, to give or diſpoſe upon his *moveables* in his *Life*, yet he cannot do any deed to *defraud his Wife* of this *Right*, the *fraud* being *palpable*; ſhe has alſo a right to the *liferent of the third of the lands*, wherein he *dyed infeft*, and this is called a *Widows Terce*; and to any other *proviſions* contained in her *Con-*

Part 1. Tit. 6.

tract of Marriage, which *provision* if it exceeds the *Terce*, it excludes * it; and the *Husband surviving* has *Right* to the *Tocher:* and if he *marry* an *Heritrix*, he has *Right* to all her *Lands*, after her *Death*, during his own *life*, if there be a *Child* of the *Marriage* who was heard *cry*, and this is called, *the courtisie of Scotland**.

*K.C.2 Par. 3. Act 10.

* Reg. Ma. lib. 2. cap. 58. Leg. Burg. cap. 44.

Marriage is dissolved by *Divorce*, which is granted either for *wilful disertion*, and *non adherence*, to be procured by a *Process* before the *Commissars of Edinburgh* for *non adherence*; when either *Partie* refuse to *cohabite* together, and remains in their *malicious obstinacie four years*, and are thereupon *excommunicate* *, or for *Adultery*, in both which cases the *Persuer* must give his *Oath*, that the

* K. Ja. 6. Par. 4 Act 55

the *Proceſs* is not carryed on by *colluſion*, and after a *Decreet* of *Divorce* is obtained, in either caſe the *Partie innocent* may *marry*; but the *Partie* that is *guilty* cannot, and beſides looſes all the benefite that they could expect by the *Marriage*.

P Tit: 7.

Tit. VII.

Of Minors, and their Tutors, and Curators.

WHilſt Perſons are within *twenty one years*, the *Law* preſumes them to want that *firmeneſs of Judgement*, which is requiſite, for the exact *management of their Affairs*; and during that time, they are called *Minors*, by a general

Part 1. Tit. 6.

tract of Marriage, which *provision* if it exceeds the *Terce*, it excludes * it; and the *Husband surviving* has *Right* to the *Tocher:* and if he *marry* an *Heritrix*, he has *Right* to all her *Lands*, after her *Death*, during his own *life*, if there be a *Child* of the *Marriage* who was heard *cry*, and this is called, *the courtisie of Scotland**.

*K.C.2 Par. 3. Act 10.

* Reg. Ma. lib. 2. cap. 58. Leg. Burg. cap. 44.

Marriage is dissolved by *Divorce*, which is granted either for *wilful disertion*, and *non adherence*, to be procured by a *Process* before the *Commissars of Edinburgh* for *non adherence*; when either *Partie* refuse to *cohabite* together, and remains in their *malicious obstinacie four years*, and are thereupon *excommunicate* *, or for *Adultery*, in both which cases the *Persuer* must give his *Oath*, that the

*K. Ja. 6. Par. 4 Act 55

the *Proceſs* is not carryed on by *colluſion*, and after a *Decreet* of *Divorce* is obtained, in either caſe the *Partie innocent* may *marry*; but the *Partie* that is *guilty* cannot, and beſides looſes all the benefite that they could expect by the *Marriage*. Part 1. Tit: 7.

Tit. VII.

Of Minors, and their Tutors, and Curators.

WHilſt Perſons are within *twenty one years*, the *Law* preſumes them to want that *firmeneſs of Judgement*, which is requiſite, for the exact *manadgement of their Affairs*; and during that time, they are called *Minors*, by a general

Part 1. Tit. 6.

Terme; though properly, ſuch onely are to be called *Minors*, who are paſt *Pupillarity*, which laſts in *Males* till *fourteen*, and in *Females* till *twelve*.

Tutory may be defined, *a power and faculty, to govern the Eſtate and Perſon of Pupils*; and the *Law* gives *Tutors*, and *Curators*, for the *manadgement* of their *Affairs*.

There are three kinds of *Tutors*, *viz. Tutor Nominate*, *Tutor of Law*, and *Tutor Dative*, *Tutor Nominate*, (who is likewiſe called *Tutor Teſtamentar*,) is he who is left *Tutor* by the Father in his *Teſtaments*, or any other *write*, and he is not obliged to find *caution*, or give his *Oath*, *de fideli adminiſtratione*; becauſe it is preſumed, the *Parent* hath choſen a ſufficient perſon.

The

The *Father* onely can name *Tutors*; but if the *Mother*, or even a *Stranger*, *give* or *diſpone* any thing to a *Child*, he may name a *Tutor* to manadge what he gives; but if there be no *Tutor* nominate, or if he accepts not, then there is place for a *Tutor of Law*, who is ſo called, becauſe he ſucceeds by *Law*, and generally, the neareſt *Agnate* (for ſo we call ſuch as are related by the *Father*) who is to ſucceed to the *Minor*, being paſt *twenty five years*, and would be *Heir* to him, is his *Tutor in* * *Law:* He takes a *Brieff* out of the *Chancellary*, and *ſerves himſelf before a Judge*, to whom it is *directed*, and the *Tutor of Law* muſt find *caution* before he *adminiſtrate.* Part 1. Tit. 7. * K. Ja. 3 Par. 7. Act 32.

If he do not *ſerve* within a *year* after the time he might have

Part 1. Tit. 7.

have *ſerved*, then any perſon may give in a *Signator* to the *Exchequer*, and he gets a *gift* under the *Privie Seal*, of being *Tutor Dative*, and finds *caution*, *acted in the books of Exchequer*: But of old, they found *caution* in the *Commiſſars books*: this *Tutor* and he onely is oblidged to make *Faith*, *de fideli adminiſtratione.*

If there be more *Tutors* than one, the *major part* muſt all conſent; but the *Pupil* needs not *ſubſcrive*: But if there be a *Tutor*, *ſine quo non*, he muſt alwayes be one of the *Conſenters*.

After the *years of Pupillarity* there muſt be a *ſummons* raiſed at the *Pupils* inſtance, ſummonding ſome of the *Fathers ſide*, and ſome of the *Mothers ſide*, upon nine days *warning*, to *appear* before any *Judge* and

and at the day, the *Minor* gives in a *liſt* of thoſe he intends to *choiſe* to be his *Curators*, and thoſe who accept muſt *Subſcrive* the *acceptation*, and they muſt find *Caution de Fideli**, upon all which the *Clerk extracts an Act*, which is called, *an Act of Curatory*: There uſes to be ſometimes, *Curators*, *ſine quo non*, and the *Major part* with him is ſtill a *Quorum*; except the *Minor* in his *particular Election* hath appointed otherwiſe; for the *Quorum is Arbitrarie*, and the *Act bears* how many ſhall be a *Quorum*. Part 1. Tit. 7. *Q. M. Par. 6. Act 35.

There are theſe *differences* betwixt *Tutors* and *Curators*, that *Tutor datur Perſonæ*, *Curator rei*, a *Tutor Acts*, and *Subſcrives* for his *Pupill*, a *Curator* with him; but both muſt

Part 1. Tit. 7.

must make *inventarie* of all the *Pupills Eſtate* before they *Adminiſtrate*, with conſent of the neareſt of *Kinne* on both ſides, and if they neglect to make *Inventary*, they will get no *Expenſes* allowed them during their *Adminiſtration*, and may be removed from their *Offices* as ſuſpect *; neither have *Sallaries*: and both are lyable to *Compt*, but not till their *Office expyre*, as both have *Action* againſt their *Minors*, for what they *profitably expended* during their *Adminiſtration*, which is called, *Actio tutelæ Contraria.*

*K. C. 2 Par. 2. Seſſ. 3. Act 2.

If the *Minor* have *Curators*, and do any thing without their *conſent* to his *prejudice*; (for he may make his *condition* better without them, but not worſe, the *advantage* being

being evident and without *hazard*) then that *Act* is, *ipſo jure null*, that is to ſay, he needs not *Revoke*; but if he have no *Curators*, then any *Act* he does to his own *prejudice* is *valid*; but he muſt *reduce* the ſame *thus*, *viz.* he muſt writ a *Revocation* and *Subſcrive* it before *two witneſſes*, and *Regiſtrate* it, and thereupon he muſt raiſe and *execute* a *Summonds* of *Reduction* of that *Act*, *ex capite Minoritatis*, *& læſionis*, before he be 25 *years of age*, wherein he muſt make appear, he was both *Minor*, and was *læs'd*; otherwayes, the *Lords* will not repone him: Though this *Revocation* be not abſolutely neceſſarie, yet the *executing* of a *Summonds* before 25 is abſolutely neceſſary: and though a

Minor

Part 1. Tit. 7.

Minor ſwear not to *Revoke*, yet this *Oath* is *declared null* by *Law*, and the *Eliciter* of it *puniſhable*, and *infamous* *; but if he *Fraudulently circumveene* another, by ſaying he was *Major*, he will not be reſtored againſt his own *fraud*.

*K.C.2 Par. 3. Act 19.

A *Tutor* or *Curator*, cannot perſue his *Pupill*, till he has *compted* for his *intermiſſions*; for its *preſum'd* he has his *Pupills Eſtate* in his own *hands*, and whatever *Right* he *buyes* of what belong'd to his *Pupill* is *preſum'd* to be bought with his *Pupills means*; and ſo the *advantage* muſt *accreſs* to the *Pupill*.

So carefull has *Our Law* been to *protect minors*, and to ſecure *Old Eſtates*, that *minor non tenetur placitare ſuper hæreditate paterna* *, that is to ſay, a

* Statut: a Will: cap. 39.

Minor

minor is not obliged to answer any *process* concerning his *Fathers Heritage*; but, yet if his *Fathers Right* be quarrelled for his *Fathers crimes*, or *delicts*, as in the cases of *falshood*, *forfeiture*, or *Recognition*, these cases are excepted, and he is obliged to answer. *Secundo*, This *priviledge* extends not to *Actions* concerning *marches*, or *division of lands*. *Tertio*, It defends not against the *Superiour persueing* for his *casualities*. *Quarto*, Where the *minors right* is only *quarrell'd consequentiallie*, the *chief right quarrolled* belonging to a *major*, there is no place for this *priviledge*. *Quinto*, It defends not in cases where the *Heritage* was *deryv'd* from *Collaterals*, such as *Brothers*, or *Uncles*. *Sexto*, It defends only where the *Heritage*

Part 1. Tit. 7.

tage deſcended even from the *Father*, or *Grand-Father*, if they dyed in *peaceable Poſſeſſion*, and if no *Proceſs* was intented againſt them in their own *life time*, *Septimo*, It takes only place, where the *Father* was *actually Infeft*; but then it is *accounted Heritage*, tho it was *conqueſt* by the *Father*.

The *priviledge of minoritie*, is in ſome caſes allowed to the *minors Heir*: Which are *compriſed* in theſe *following rules* 1. If a *minor* ſucceds to a *minor*, the time *of Reſtitution* is *Regulated* by his own *minority*, and not by his *Predeceſſors*. 2. If the *Predeceſſor* be *major*, and *Intra quadriennium utile reſtitutione*, is competent during the *Heirs minority*; but he has no further of the *anni utiles*, than remained to the *defunct*, the time

time *of his deceaſs.* 3. If a *major* ſucceed to a *minor*, he has only *quadriennium utile*, after the *minors deceaſs*, or ſo *much thereof* as was *unexpyred* at that time. Part 1. Tit. 7.

Minoritie ends both in *Men* and *Women*, when they are 21. *years of age compleat*; but *after* that there is 4. *years granted*, wherein they may *reduce* what they did *Revoke* before they were 21. *years compleat*, and theſe *years* are called, *quadrienneum utile.*

If a Man be an *Idiot*, or *Furious* he muſt be *found* to be ſo by an *inqueiſt*, and *thereafter* his neareſt *of kinne may ſerve themſelves Tutors*; or the *Exchequer* may grant a *Tutor dative*, *if they ſerve not*, but the *Tutor in Law*, will be *preferred* to that *Tutor dative* offering to

ſerve

Part 1. Tit. 7

ſerve *quandocunque*, and it muſt be proven to the *inquieſt* at the time of the ſervice, that he is *furious*, and when he began to be ſo, and all deeds done by *him after that are null*, not only from the *date of the ſervice*, but from the time that he was *found* to be *Idiot*, or * *Furious*.

*K.J.6. Par. 10. cap. 18.

If a *Perſon* be *Prodigal*, or *Spend-thrift*, he *interdicts himſelf*, either *voluntarly*, which is done by a *Band*, whereby he obliges *himſelf* to do nothing without the conſent of ſuch *friends* as he therein condeſcends upon; and theſe are *therefore* called the *interdicters*, and *if* this *Narrative be falſe*, ſo that the perſon is not *improvident*, as he *relates in the Band*, this *voluntar interdiction* will be *reduc'd*. *Secundo*, *Interdiction*

terdiction proceeds upon a *perſute*, at the *inſtance of the neareſt of kin*, againſt the *prodigal* whom the *Lords* will *interdict* if they ſee cauſe; or 3. though there be no *perſute*; yet if in another *proceſs* they find he has been often, or is *obnoxious* to be cheated, they will *interdict him*, *Ex proprio motu*, and theſe are called *Judicial interdictions*; and no *interdiction* laſts longer than the *Levitie* and *Prodigality* which occaſioned it, but this requires alſo the ſentence of a *Judge*. Part 1. Tit. 7.

Upon this *voluntar Band*, the *Lords of the Seſſion* grants *letters of Publication*, and after theſe *Letters* are publiſhed, at the *Mercat Croſs of the head Burgh of the Shire*, where the *perſon interdicted dwells*, and are *Regiſtrat*; the *perſon interdicted*

dicted can do nothing to the *prejudice of his heritable Eſtate*, otherwayes the *interdicters* may *reduce* theſe deeds as done after the *publication of the interdiction*; (for interdictions extend only to *Heritage*; but yet the perſon himſelf is ſtil lyable to *perſonal execution*, even upon theſe deeds done after *interdiction.*

A *Father*, is likewiſe in *Law Adminiſtrator* to his own *Children*, that is to ſay, is both *Tutor*, and *Curator*, to them, if they *fall* to any *Eſtate* during their *minoritie*, and if either *Pupill* or *Minor* have any *Legal Action* to *proſecute*, and want *Tutors* or *Curators*, the *Lords* will upon a *Bill Authorize Curators*, who are therefore called *Curators*, *ad lites.*

All *Tutors* and *Curators* can act

act and do whatever the *Pupill* might do if he were *major*; except in *ſelling of land*, which they cannot *ſell* without a ſentence of a *Judge*; finding the *vendition* neceſſar for *payment of debt*, or ſetting *Tacks* to laſt beyond their own *Office*. Part 1. Tit. 5.

All theſe *Tutors*, *Curators*, and *Adminiſtrators*, or any who behave as ſuch, and who are called in *Our Law Pro-Tutors*, are lyable to do *exact Dilligence*, and therefore; if any of their *Pupills Debitors* becomes *Bank-rupt*, or their *Tennents* break, they are lyable and the *Pupill* may purſue any one of the *Tutors* for the negligence of all the reſt, but he has his relief againſt the reſt:

They are likewayes lyable

to

Part 1. Tit. 7.

to put the *minors Rents*, out upon *Annuallrent*, within *half a year*, *or a term after* they receive them, and to put out his *money* upon *Annuallrent* within a *year*, both which times are allowed to get good *Debitors* but if his *Bands* bear *Annuallrent*, they are only obliged to take in these *Annuallrents* once during their *Office*, and to turn them in a *Principal ſumm*, bearing *Annuallrent.*

After *Tutors* and *Curators* have once accepted they cannot *Renounce*; but if they miſcarie in their *Adminiſtration*, they may be removed, by an action, as ſuſpect *Tutors.*

If there be moe *Tutors* or *Curators*, the *Office* upon the death of any of them *Accreſſes* to the *Survivers*; except they be

be *named joyntly*; for then the first *Nomination* is diſolved by the death of any one of them, the *defunct* not having truſted any one, and for the ſame reaſon, *if* a certain number be declared a *Quorum*, the *Nomination fails*, *if* ſo many dye as that this *number ſurvives* not, nor does the *Office Accreſſe* to ſuch as *Survive*.

We have little uſe in *Scotland*, of what the *Inſtitutions of the Roman Law* teach, concerning *ſlaverie*, or *Patria poteſtas*, for we as *Chriſtians* allow no Men to be made *Slaves*, that being contrare to the *Chriſtian liberty*; and the *Fatherly power* or *Patria poteſtas*, has little effect with us; for a *Child* in *Familie* with his *Father*, acquires to himſelf and not to his *Father* as in the *Civil Law*.

PART SECOND.

Tit. I.

Of the Diviſion of Rights, and the ſeveral wayes by which a Right may be acquired.

BEing to treate in the *ſecond Book* of things themſelves, to which we have *Right*, and how we come to have *right to them*, It is fit to know.

That ſome *things* fall not under *commerce*, and ſo we cannot acquire any *propertie* in them, ſuch as are things *common*, as the *Ocean*, (though our *King* has *Right* to our *narrow Seas*, and to all the *Shoars*.)

Secundo,

Secundo, Things publick, which are *common* only to a *Nation or People*, as *Rivers*, *Harbours*, and the *Right of Fiſhing*, in the ſaids *Rivers*. *Tertio*, *res univerſitatis*, which are *common* only to a *Corporation* or *Citie*, as a *Theater*, or the *Mercat place*, and the like: *Quarto*, Things that are ſaid to be no *Mans*, but are *Juris Divini*, which are either *ſacred*, ſuch as the *Bells of Churches*, for though we have no *conſecration* of things ſince the *Reformation*, yet ſome things have a *Relative Holineſs* and *Sanctity*, and ſo fall not under *Commerce*, that is to ſay, cannot be *bought* and *ſold* by *Private Perſons*. *Quinto*, Things that are called *ſanctæ*, ſo called becauſe they are *guarded from the injuries of Men*, by ſpeciall Part 2. Tit. 1.

Part 2. Tit. 1.

Sanctions, as the *walls of Cities*, *Perſons of Ambaſſadours*, and *Laws*, *Sexto*, Things *Religious*, ſuch as *Church-Yeards*.

As to thoſe things which fall within *Commerce*, we may *acquire right to them*, either by the *Law of Nature*, *and Nations*, or by our *Civil and Municipal Law*, *dominion* or *propertie* is acquired by the Law of Nations either by our own *fact and deed*. or *Secundo*, by a *connexion* with, or *dependence* upon *things* belonging to us, the firſt by a *General term* is called *Occupation*, and the laſt *Acceſſion*.

Occupation, *is the apropriating and apprehending of thoſe things, which formerly belonged to none.* And thus we acquire *propertie* in *wild Beaſts*, of which we acquire a *Right* how ſoon we *apprehend them*, or are in the *pro-*

proſecution of them with *probabilitie* to *apprehend* them, as alſo we retain a *right* to them whilſt they remain in *Our poſſeſſion*, and even after they have eſcapt, if they be yet *recoverable* by us. *Secundo*, Propertie comes by *Acceſſion*, as for *inſtance*, a *Houſe Built* upon, or *Trees taking root in our ground*, and the *product* alſo of our *beaſts* belong to us, and *ground* that *grows* to our *ground* becomes *inſenſibly* ours, and is called, *Alluvio* by the *Civilians*. And it is a general Rule in *Law*, that *acceſſorium ſequitur Naturam ſui principalis*; and yet a Picture drawn by a great *Maſter* upon another mans Sheet or Table, belongs to the *Painter*, and not to the *Maſter* of that whereon it is drawn, the *meanneſs* of the one ceding to the *nobleneſs* of the other.

Part 2. Tit. 1.

There are many other wayes of acquiring *Right* and *Property*, which may be referred either to *Occupation*, or *Acceſſion*; as if a Man ſhould make a *Ship* of my *Wood*, it would become the *Makers*, and would not belong to me, to whom the *wood* belonged, and this is called *Specification*, in which this is a general rule, that, *if the ſpecies can be reduced to the rude maſſe of matter, then the Owner of the matter is alſo owner of the ſpecies, or thing made*; As, *if a Cup be made of another mans Silver, the cup belongs not to the maker, but to the owner of the Mettle*; becauſe it can be reduced to the firſt *Maſs of Silver*, but if it cannot be reduced, then the *Species* will undoubtedly belong to him that made it, and not to the

owner

owner of the matter, as *Wine*, and *Oyl*, made of anothers *Grapes*, and *Olives*, which belongs to the *maker*, ſeing *wine*, cannot be reduced to the *Grapes of which it was made*.

Propertie is likewiſe acquired when two or moe *Perſons* mixe together in one, what formerly belonged to them ſeverally, and if the *materials mixed be liquid*, it is called by a *ſpecial name*, *Confuſion*, as when ſeveral *Perſons Wines* are mixed and confounded together; but if the particulars mixed, be dry and ſolid, ſo as to retain their different ſhapes and Forms, it is called *commixtion*, and in both caſes, if the *confuſion*, or *commixtion* be by conſent of the *Owners*, the *body* or thing reſulting from it, is common to them all; but

Part 2. Tit. 1. if the Commixtion be by chance, then if the matterials cannot be *ſeparated*, the thing is yet *common*; as when the *Graine* or *Corns* of two perſons are mixed together by *chance*, here there muſt neceſſarly be a *community*; becauſe, *the ſeparation is impoſſible*; but if two *Flocks of ſheep* belonging to different perſons ſhould by *accident mix together*, there would be no *community*; but every man would retain right to his own *Flock*, ſeing they can be *diſtinctly known* and ſeparated, and theſe two ways of *acquiſition* are by *accerſſion*.

The laſt, and moſt ordinarie way of *acquiring* of *property*, is by *tradition*, which is defyned *a delivery of poſſeſſion by the true owner, with a deſign to transfer the property to the Receiver*

ceiver, and this *tranſlation*, is made either by the *real delivery* of the thing it ſelf, as of a *horſe*, a *cup*, *&c.* or by a *Symbolick delivery*. As, is the *delivery of a little Earth and Stone in place of the Land it ſelf*; for, where the thing cannot be *truely delivered*, the *Law* allows ſome *ſymbols*, or *marks of tradition*, and ſofar is *tradition* neceſſary to the *acquiring* of the *prorerty* in ſuch caſes, that he who gets the *laſt right*, but the *firſt tradition* is ſtill preferr'd by our *Law*.

If he who was once *Proprietar* does willingly quite his *Right*, and throw it away, (which the *Civil Law* calls, *pro derelicto habere*,) the *firſt finder acquirs a new Right*, *per inventionem*, or by finding it, by which way alſo men ac-

Part 2. Tit. 1.

quire *right to Treaſures*, and *to Jewels* lying on the *Shoare*; and generally to all things that belonged formerly to no man, or were thrown away by them; But it is a *general Rule* in *Our Law*, *that what belongs to no man is underſtood to belong to the King.*

Preſcription, is a chief way of *acquiring Rights* by the *Civil Law*; but becauſe, that *Title* comprehends many things, which cannot be here underſtood, I have treated that *Title* amongſt the ways of *looſing Rights*, it being upon diverſe conſiderations, *modus acquirendi & amittendi.*

We alſo acquire *Right* to the *Fruits* of thoſe things which we poſſeſs, *bona fide*, if theſe *Fruits* were gathered in or *uplifted*, and *conſumed* by us

us, whilſt we thought we had a *good Right* to the thing it ſelf, for though thereafter our *Right* was found not to be good; yet the *Law*, judged it *unreaſonable to make us reſtore what we lookt upon as our own; when we ſpent it*, and therefore, whenever this *bona fides* ceaſeth, which may be ſeveral wayes, eſpecially by *intenting* an action at the *true owners inſtance*, we become anſwerable for theſe *Fruits*; though thereafter they be *percepti & conſumpti*, by us.

Tit. II.

Of the difference, betwixt Heritable, and Moveable Rights.

HAving *in the former* Title *cleared, how we acquire* Rights, *we come now to the diviſion of them.*

The moſt comprehenſive

diviſion

Part 2. Tit. 2.

diviſion of Rights amongſt us, is, that whereby they are divided into *Heritable*, and *Moveable Rights.*

Heritable Rights in a ſtrict ſenſe, are only *Lands*, and all *ſumms of money*, and other things which can be moved from one place to another are *moveable* but that is only counted *Heritable* in a *Legal Senſe*, which belongs to the *Heir*, as all other things which fall to the *Executor* are *moveable*, and ſo *ſums of money*, albeit of their own *nature* they are *moveable*; yet if they were lent for *Annualrent* they were of old *repute heritable.*

For underſtanding whereof it is neceſſar to know that albeit by the *Cannon Law* all *Annualrents* were forbidden, as being contrare to the *Nature* of the thing, *money* being

being barren of its own nature: yet the reformed *Churches* do generally allow it; nor were the *Jews* prohibited to take *Annualrent* from *Strangers*.

Before the *year* 1641 all *Bands*, and *ſums*, bearing *Annualrent*, were *Heritable*, as to all effects ſo that the *Executor*, who is *Hæres in mobilibus*, had no *intereſt* in, nor ſhare of ſuch *Bands*, but they belonged intirelie to the *Heir*; but that *Parliament* finding that the reſt of the *Children*, beſide the *Heir* had no *proviſion* by *Our Law*, except an *equall ſhare* in the *moveables*, they therefore ordained that all *Bands for ſumms of money* ſhould be *moveable*, and ſo belong to the *Executors*; except either the *Executors*, were

Part 2. Tit. 2.

were ſecluded, or the *debitor* were expreſly obliged to infeft the *Creditor*, which is likewiſe renewed ſince the *Kings Reſturation**: For in theſe caſes, it was clear that by the *diſtination* of the *defunct*, (which is the great *Teſt* in this caſe) theſe *ſums* were to be *Heritable*; and yet all *ſums* bearing *Annualrent*, are ſtill *Heritable* in ſo far as concerns the *Fisk*, or the *Relict*; ſo that if a *band* bear *Annualrent*, to this day the *Fisk* cannot claime any right to it, as falling under the *Rebells ſingle Eſcheate*, (whereby when he becomes *Rebel* all his *Moveables* fall to the *King*;) nor has the *Relict* any right to a *third of it*, as ſhe has to a third of all *moveables*, the *Law* having preſumed that *Relicts* will be ſtill ſufficiently

*K. C. 2 Par. 1. Act 32.

ently ſecured by their *contracts*; but whether the *ſum be Heritable*, or *moveable*, all the bygone *Annualrents*, and generally all bygones are *moveable*, as to all intents and purpoſes, and ſo fall to *Executors*, and to the *Fisk*, and to the *Relict*; becauſe bygone reſts are lookt on as money lying by the *debitor*, they being already payable, as all *obligations* bearing a *tract of future* Time belong to the *Heir*. Part 2. Tit. 2.

So far does the *Law* defer to the will of the *Proprietar*, in *regulating* whither a *ſum* ſhould be *Heritable*, or *Moveable*; (the *Law* thinking that every man is *beſt Judge* how his *Eſtate* ſhal be beſtowed;) that if a man *deſtinate* a *ſum* to be *imployed* upon *Land* or

An-

Part 2. Tit. 2.

Annualrent, this *deſtination* will make it *Heritable*, and to belong to his *Heir*; or though the *ſum* was *originally ſecured* by a *moveable band*, yet it may become *heritable* by the *creditors* taking a *ſuperveening heritable ſecurity* for it, or by compriſing for his *ſecurity*; but yet the *Creditors deſign* is more to be conſidered, than the *ſupervenient right*; as for inſtance, a ſum may be moveable *ex ſua natura*, and yet may be ſecured by an *heritable ſurty*; as in the caſe of bygone *annualrents*, due upon *infeftment of annualrent*, which are unqueſtionably *moveable* of their own nature, and yet they are *heritably* ſecured; and even *Executors* may recover them by a real Action of *poynding of the ground*: And, if a *Wedſet* bear

a

a *proviſion*, that notwithſtanding of *Requiſition*, the *Wedſet* ſhall ſtill ſubſiſt, the *requiſition* will make the ſum *moveable*, though it continue ſecured by the *Infeftment*; as alſo, ſumes *ab initio Heritable*, may be ſecured by an *Acceſſory moveable ſecurity*, without altering their *Nature*; as for inſtance, if one take a *Gift of Eſcheat* for ſecuring himſelf in *Heritable* ſums; this does not alter the *Nature* of the former *Heritable Right*.

Though a ſum be *Heritable*, yet if the *Creditor* to whom it is due require his *money*, either by a *charge* or *requiſition* it becomes *moveable*, for the *Law* concludes in that caſe, that the *Creditor* deſigns rather to have his *money*, than lying in the *Debitors hands* upon

upon the former *ſecurity*; and if it were lying in *money* beſide him it would be *moveable*: and a *requiſition* to one of the *Cautioners* will make it *moveable*, as to the *Principal* and all the other *Cautioners*; But a *charge* on a *band* wherein *Executors* are *ſecluded*, will not make the ſum *moveable*, for the deſign of the *Creditor* is preſumed to continue in *favours* of the *Heir*, till the ſum be payed, or the *Band innovated*; but it *has been otherways decided of late*; And for the ſame Reaſon a *requiſition* uſed by a *Wife*, who has a *heritable* ſum, that falls not under the *Jus Mariti*, will not make it *moveable*, ſince it is preſumed ſhe deſigned only to get *payment*, but not to give it to her *Husband*.

But if the *Creditor* who required

quired his Money take *annualrent* after that *Requiſition*, it is preſum'd that he again altered his Inclination and reſolved to have it *Heritable*,& to continue due by vertue of the*firſt Security*

Though a *Band* be *heritable*, as bearing *annualrent*, yet before the *terme of payment* it is *moveable*, as to all perſons.

From all which it is clear, that *ſome ſums* are *moveable* as to the *Executor*, but not as to the *Fisk* or *Relict*, and ſome may be *moveable*, as to the *Debitor* and his *Executors*, and yet may be *Heritable* as to the *Creditor* and thoſe *repreſenting* him, as for *inſtance*, an *obligation*, to *imploy a ſum* due by a *moveable band*, upon *Land* or *annualrent* for the *Heirs* of a *Marriage*, that *ſum* as to the *Creditor* would be *Heretable*, yet

que

Part 2. Tit. 3.

quo ad the *Debitor* it would remain *moveable.*

Title III.

Of the Conſtitution of Heritable Rights, by Charters and Seaſins.

HAving treated in the former *Chapter* of the *difference betwixt Heritable and Moveable Rights*, it is now fit to begin with *Heritable Rights* as the more *Noble.*

Our *Heritable Rights* are *Regulate* by the *Feudal Law*, by which *Feudum*, which we call a *few* was defined to be *a free and Gratuitous Right to Lands made to one for ſervice to be performed by him:* he who grants this *Few*, is in *Our Law*

Part 2. Tit. 3.

Law called the *Superiour*, and he to whom it was *granted* is called the *Vaſſal*; the *Superiours Right* to the *Fie* is called *Dominum directum*, and the *Vaſſals Right* is called *Dominum utile*, and if that *Vaſſal* diſpone the *Land* to be *holden of himſelf*, then that other *Perſon* who *receives* that *Few*, is called the *ſub-Vaſſal*; whereas the *Vaſſal* who *granted* the *Few* becomes the *immediate Superiour* to this *ſub-Vaſſal*, and the *Vaſſals Superiour*, becomes the *Sub-vaſſals* mediate *Superior*, and is ſo called becauſe there is another *Superiour interjected* betwixt him and the *ſub-Vaſſal*.

The *Superiour* diſpons ordinarly this *Few* to be holden of him by a *Charter* and *Seaſin*: The *Charter* is in effect the *diſpoſition* of the *Few* made by

by the *Superiour* to the *Vaſſal*, and when it is firſt *granted*, it is called an *Original Charter* or *Right*, and when it is renewed it is called a *Right* be *progreſs*, and proceeds either upon *Reſignation* when the Lands are *Reſigned* in the *Superiours* hands for *new Infeftment*, either in favours of the *Vaſſal* himſelf, or of ſome *third partie*, or by *confirmation*, when the *Superiour* confirms the *Right* formerly granted, and if it is tobe holden from the *Diſponer* of the *Superiour* that is called *a me*, and is a publict *Right*, and is ſtill drawn back to the date of the *Right* Confirmed; But if the *Confirmation* be onely of *Rights* to be holden of the *Vaſſal*, it is called, *de me*, and is a baſe *Right*, the effect of this *Charter* being to ſecure againſt *forfaulture*

faulture or *recognition* of the *Superiour*, all which are voluntar *Rights*; but if they be granted in obedience to a *Charge* upon *Appriſing* or *Adjudication*, they are neceſſar.

If the *Charter* contains a Clauſe *de novo damus*, then it has the Effect of an *Original Right*, and ſecures againſt all *Caſualities* due to the *Superiour*; in which the firſt thing expreſſed is for what Cauſe it was granted, and if it was granted for Love and Favour, *Our Law* calls that a *lucrative Cauſe*, or for a Price, and good Deeds, this we call *an Onerous Cauſe*.

The ſecond thing conſiderable in a *Charter*, is the *diſpoſitive Clauſe*, which contains the Lands that are diſponed; and *regulariter* with us, the *Charter*

Part 2. Tit. 3.

Charter will give *right* to no Lands, but what are contained in this *Clauſe*, though they be enumerated in other places of the *Charter*.

The third *Clauſe* is that wherein is expreſt the way how the *Lands* are to be holden of the *Superiour*, and this is called the *Tenendas*, from the firſt word of the *Clauſe*.

The fourth *Clauſe*, is that which expreſſes what the *Vaſſal* is to pay to the *Superiour*, and this *duty* is called the *Reddendo*, becauſe the *Clauſe* whereby it is payable begins, *Reddendo inde annuatim*.

The fifth *Clauſe*, is the *Clauſe* of *warrandice*, which is either *Perſonal*, or *Real*, *Perſonal warrandice* is when the *Author* or *diſponer* is bound *perſonally*, and is either ſimple

warrandice

warrandice, which is only from *ſubſequent* and *future deeds* of the *Granter*; and this warrandice is implyed in *pure donationes*; or *ſecundo*, *warrandice* from *Fact* and *Deed*, which is, that the *Granter* hath not done, or ſhall not doe any deed *prejudicial* to the *right* warranded. Or *Tertio*, Warrandicè is abſolute, and that is, to warrand againſt all *mortals*: And in abſolute *warrandice*, this is a *rule* that an *Adæquate Oneroufe cauſe preſums* ſtill abſolute warrandice; But abſolute warrandice in *Aſſignations* imports only that the *debt* is truly due, and not that the *Debitor* is *ſolvent*.

All *Rights Granted* by the *King* are preſumed to be *Donations*, and import no warrandice.

Part 2. Tit: 3.

Real warrandice, is when *Infeftment* of one Tenement is given in ſecurity of one another.

The *Effect* of warrandice is, that if the *thing* warranded be taken away, there is competent to the *partie*, to whom the warrandice is *granted*, *an action* of *eviction*, for *relief*.

Becauſe *Tradition* is *requiſite* to the compleating of all *Rights*; therefore the *Charter* contains a *Command* by the *Superiour* to his *Bailly*; to give *actual ſtate* and *Seaſin*, to the *Vaſſal*, or to his *Atturney* by *Tradition of earth and ſtone*, and this is called the *precept of Seaſin*, and upon it the *Vaſſal*, or ſome other perſon having a *Procuratory* from him, gets from the *Bailly earth and ſtone* delivered,

delivered, in preſence of a *Notar* and *two witneſſes*, which *Notar* writes out an *Inſtrument* upon all this, which *Inſtrument* is called the *Seaſin*. And if the *Superiour* gives *Seaſin* himſelf, it is called a *Seaſin*, (*propriis manibus*;) ſo that a Formal *Seaſin* is the *Inſtrument* of a *Notar*, bearing the delivery of *earth and ſtone*, or ſome other *Symbols* by the *Superiour*, or his *Bailie* to the *Vaſſal*, or his *Atturney*, the Tenor whereof is known and fixt, and now by a late *Statute* the *witneſſes* muſt ſubſcrive the *Inſtrument**; and thus the *Vaſſal* ſtands *Infeft* in the Land by *Charter* and *Seaſin*. Part 1. Tit. 6. *K. C. 2 Par. 3. Act 5.

This *Seaſin* being but the aſſertion of the *Notar*, proves not, except the warrand of it, that is to ſay, the *precept* or *di-*

Part 2. Tit 3. *ſpoſition* whereon it proceeded be produced; But a *Seaſin* given by a *Husband* to his *Wife*, or by a *Superiour* to his *Vaſſal*, *propriis manibus*, (that is to ſay, by the *Granters own hands* without a *Precept*) is ſufficient, when the *Competition* is with the *Granters* own *Heirs*; or with no more *ſolemn Rights*, and is not exorbitant: and after *fourty years*, there is no neceſſity to produce either *precept* of *ſeaſin*, or *Procuratorie* of *Reſignation* by a ſpecial ſtatute*.

*K. J. 6. Par. 14. act 214. This *Seaſin* muſt be *regiſtrated* within 60. dayes, either in the general *Regiſter* at *Edinburgh* or in the particular *Regiſters* of the *Shire*; *Stewartry* or *Regality* where the *land* lyes, †els the *right* will not be Valid, againſt a *ſingular Succeſſor*; that is to ſay, if any other perſon buy the

†K. J. 6. Par. 22. Act 16.

the Land, he will not be obliged to take notice of that *Seaſin*; but the Right will ſtill be good againſt the Granter and his *Heirs*. Part 2. Tit. 5

If *Lands* lye *Diſcontigue*, every *Tenement* muſt have a ſpecial *Seaſin*; except they be *unite* in one *Tenement*; and then one *Seaſin* ſerves for all; if there be a ſpecial place expreſt, where *Seaſin* ſhould be taken; but if there be no place expreſt; then a *Seaſin* upon any part will be *ſufficient*, for the while, *Contiguous Tenements*, (theſe being naturally unite;) but will not be ſufficient for Lands, lying *diſcontigue*; And one *Seaſin* will ſerve for all *Tenements*, of one kind; but where they are of *ſeveral kinds*; as Lands, Milnes, *&c.* they will require ſeveral *Seaſins*; The

Part 2. Tit. 3.

ſymbols of *Poſſeſſion* being different; for *Lands* paſs by the *Tradition* of *earth* and *ſtone*, and *milnes* by the *clap* and *happour*.

Sometimes *Lands* are erected into a *Barronie*, (the nature of which is explained before, *Tit. Inferiour Iudges*,) and whenſoever this is granted, *Union* is imployed as the leſſer degree.

Erection in a *Barrony* can only be by the *King*, and is not *Communicable* by any *Subaltern rights*, albeit the whole *Barrony* be diſponed; tho the *Union* may be thereby *Communicate*. This *union* can only be *granted* by the *King*, which he may *grant* either *Originally*, or by *Confirmation*; and being ſo granted it may be *Tranſmitted* by the *Receiver* to a *Sub-Vaſſal*; but if a part of the *lands united* be diſponed

diſponed, the whole *union* is not diſſolved, but the Part diſponed onely; and this *Union*, and all other *priviledges*, and *proviſions*, can onely be granted in the *Charter*; but not in the *Seaſin*. Part 2. Tit. 4.

Tit. IV.

Of the Several Kinds of Holding.

THe firſt *diviſion* of *Feus* from the *ſeveral kinds of holding*, is that ſome *lands*, hold *ward*, ſome *Feu*, ſome *Blench*, and ſome *Burgage*.

For underſtanding *ward-holdings*, it is fit to know, that at firſt, all *Feus* were *Rights* granted by the *Longo-Bards*,

Part 2. Tit. 4.

and the other *Northern* Nations, (when they conqueſt *Italy*) to their own *Souldiers* for ſervice to be done in the *Warrs*; and therefore *Ward-holding* which is *the propereſt holding*, is called *ſervitium militare*, and all *Lands* are therefore preſumed to hold *ward*; except another *holding* be expreſt; and *ſervitium debitum & conſuetum*, is interpret to be *ward-holding*.

The advantages ariſing to the *Superiour*, by the *ſpeciality of this holding*, are that the *Superiour* has thereby the full *meals*, and duties of the *ward-Lands*, during the years that his *Male-Vaſſal* is *Minor* *; for the *Feu* being given *originally* to the *Vaſſal*, for *Military ſervice*, it returns to the *Superiour*, during *Minority*; becauſe the *Law* pre-

* Q. Ma Par. 5. Act 5. K. Ja. 6. Par: 2. Act 42.

preſumes, that the *Minor* is not able to ſerve his *Superiour* in the *Warrs*, but in *Female-Vaſſals*, this *caſualitie* laſts only till 14. *years compleat*; becauſe, they may then *marry husbands*, who may be able to ſerve the *Superiour*, and this properly is called the *Caſuality of ward*; *for Marriage*, is due in other *holdings*, as ſhall be cleared in the next *Title*. Part 2. Tit. 5.

Feu holdings, is that whereby the *Vaſſal* is obliged to pay to the *Superiour* a *ſum of money* yearly, in name of *Feu-dutie nomine feudi firmæ*.

This holding has ſome *Reſemblance* to the (*Emphyteoſis*) in the *Roman Law*; but is not the ſame with it; for *Emphyteoſis* was a perpetual *Location*, containing a penſion, as the *hyre* which was granted, for *Im-*

Part 2. Tit. 4.

proving and *Cultivating Barren ground*; but our *Feu-holding*, comes from the *Feudal Law*, (whereof there was no *Veſtige* in the *Civil Law*,) and paſſes by *Infeftment* to *Heirs*.

Blench-Holding, is that whereby the *Vaſſal* is to pay an *Eluſory duty*, meerly for acknowledgement, as a *penny*, or a *pair of Gloves*, *nomine albæ firmæ*, and ordinarly it bears, *ſi petatur tantum*.

Theſe *Blench duties* are not due, whether they be of a *yearly growth*, or not; except they be required *yearly* by the *Superiour* *, as for inſtance, if the *Blench dutie be yearly Attendance at ſuch a place, or a Roſe yearly, the Superiour can ſeek nothing for his blench dutie, except he required the ſame within the year.*

*K. J. 6. Par. 18. Act 14.

Burgage

Burgage-holding, is that *duty* which *Burghs Royal* are obliged to pay the *King*, by their *Charters*, *erecting them in a Burgh Royal*, and in this the *Burgh* is the *Vaſſal*, and not the particular *Burgeſſes*, and the *Bailiffs* of the *Burgh* are the *Kings Bailiffs*; nor can *Seaſin* in *Burgage Lands*, be given by any other than the *Bailly*, and *Town Clerk* ‡, if the *Town* have any and they muſt be *Regiſtrated* in the *Town Clerks Books* *. Part 2. Tit. 4. ‡K. J. 6. Par. 1. Act 27. *K. C. 2 Par. 3. Act. 11.

Before the *Reformation* there was another kind of *holding* in *Scotland*, which was of *mortified Lands*, granted to the *Church*, and the only *Reddendo*, was *prayers*, and *ſupplications*, in behalf of the *Mortifiers*.

Tit.

Title V.

Of the Caſualities, due to the Superiour.

THe *Feu* being thus Stated by the *Superiour*, in the *perſon of his Vaſſal*, it will be fit in the next place, to conſider, what *right* the *Superior retains*, and what *Right* the *Vaſſal acquires* by this *conſtitution of the Fie.*

The *Superiour* retains ſtill *dominium directum* in the *Feu*, and the *Vaſſal* has only *dominium utile*; and therefore the *Superiour* is ſtill *Infeft* aſwell as the *Vaſſal*; but the *King* needs not be *Infeft*; for he is *Infeft jure Coronæ*, that is to ſay, his being

being *King, is equivalent to an Infeftment.* Part 2. Tit. 5.

The *Superiour* has different *advantages*, and *Rights*, according to the different maner of *holdings*, and there are ſome *Rights* and *Caſualities* common to all *holdings*.

Ward-holdings, gives the *Superiour a Right*, to the *meals*, and *duties* of his *Vaſſal Lands*, during all the *years* that his *Vaſſal* is *Minor*; and this is properly called the *caſualitie of ward*; but the *Superiour*, or his *donatar*, are obliged to entertain the *Heir*; if he have no other *Feu*, or *Blench*, *Lands*, and to uphold the *houſe*, *parks*, *&c.* in as good condition as they found them; and muſt find caution for that effect*. *K. J. 4. Par. 3. Act 25. K. Ja. 5. Par. 4. Act 15.

If

Part 2. Tit. 5.

If the *Vaſſal* ſells, or diſpones the half of his *ward-lands*, to any except his *appearand Heir*, who is *alioque ſucceſſionæ*, without the conſent of his *Superiour*, the whole *ward-Lands* fall to the *Superiour*, *for ever*; and this we call * *Recognition*, which is introduced to puniſh the ingratitude of the *Vaſſal*, who ſhould not have *diſponed the Superiours Lands*, without his own conſent; and to ſhun this, the *Vaſſal* in *ward-Lands* gets the *Superiours confirmation*, before he takes *infeftment*; for if he takes *infeftment* before he be *confirmed*, the *lands recognoſce*, as ſaid is; except the *ſeaſin* be null in it ſelf; ſince the *Vaſſal* ſhowes ſufficiently his ingratitude by the very taking of the *Infeſtment*:

* Stat: Rob. 3. cap. 19.

And

And though the *Vaſſal* at firſt did not ſell the half without the *Superiours* conſent; yet, if he thereafter ſells as much as will extend to more than the half of the *Feu*, the *firſt buyer* will likewiſe looſe his *Right*, if it was not *Confirmed* before he took *infeftment*. Part 2. Tit. 5.

Not onely a *Confirmation*, or *Novodamus*, (if it expreſs *Recognition*) but the *Superiours* accepting *ſervice*, or purſuing for the *caſualities*, are a paſſing from the *Recognition*; becauſe, they infer the *Superiours acknowledgement* of the *Vaſſals Right*.

Recognition takes place in *taxt-ward*, as well as *ſimple-ward*, but in no other manner of holding; except the ſame be expreſly provided in the *Vaſſal*

Part 2. Tit. 5.

Vaſſals Charter, for ward-holding, is preſumed to be the only proper *Feudal Right.*

If the *Vaſſal* denyeth the *Superiour,* he loſſes his *Feu,* and this is called, *diſclamation**; but any probable ground of *ignorance* will take off this *Forfeiture.*

* Stat: Rob. 3. cap. 18. Reg: Majeſt. lib. 2. cap. 63. Par. 6. & 9.

If the *Vaſſal* who holds *Ward-Lands* dyes, having an *Heir unmarried,* whether *minor,* or *major,* the *Superiour* gets the *value* of his *Tocher*; though he offer him not a *Woman* to be his *Wife*; but if the *Superiour* offer him his *Equal,* for a *Wife,* and he refuſes to *accept,* (tho he never Marry any other perſon;) the *ſuperiour* gets the *double of his tocher* , and one of theſe *caſualities* is called the

the *ſingle Avail of the Marriage*, and the other, the *double Avail of the Marriage*; but the *modification* of this is referred to the *Lords of Seſſion*, who conſider ſtill what was the *Vaſſals free rent*, all debts deduced, and the *ordinarie modification* is about two *years rent*, of the *Vaſſals free Eſtate*; even though the *Heir* was an *Heretrix*, and though there were moe *Heirs Portioners*, there will only one *avail be due for them all.* Part 2. Tit. 5.

Though this *Caſualitie of Marriage*; be ſtill due in all *ward-holdings*; yet they may be due by *expreſs paction* in other *holdings*, and there are many in *Scotland*, who hold their *Lands Feu*, *cum maritagio*; and in both caſes, the *Marriage* is *debitum fundi.*

Though

Part 2. Tit. 5.

Though as to the *caſuality* of *ward*, every *Superiour* has *Right* to the *ward-Lands holding* of himſelf where the *Vaſſal* holds *ward-Lands*, of moe *Superiours*; Yet the *caſualitie* of *Marriage* falls only to the *eldeſt Superiour*; becauſe there cannot be more *Tochers* than one; and he is the *eldeſt Superiour* from whom the *Vaſſal* had the firſt *Feu*; but the *King* is ſtill preſumed to be the *eldeſt Superiour*; becauſe, all *Feus originally* flowed from him.

It is thought that the *Reaſon* why this *Caſualitie* is *due*, was, becauſe it was not *juſt*, that the *Vaſſal* ſhould bring in a *ſtranger* to be *Miſtreſs of the Feu*, without the *Superiours conſent*; for els he might choice a *Wife*

ou

out of a *Family* that were an *enemy* to the *Superiour*; but I rather think, that both *ward, and Marriage*, proceeded from an *expreſs paction*, betwixt *King Malcome Kenmore* and his Subjects, when he firſt *Feued* out the whole *Lands of Scotland*, amongſt them; as is to be ſeen in the firſt of his *Statutes**. Part 2. Tit. 5.

* Leg. Mal. cap. 1.

The *ſpecial dutie* ariſing to the *Superiour* in a *Feu holding*, is, that the *Superiour* gets a *yearly Feu dutie* payed to him, and if no part of this *Feu duty* be payed for two *years*, even though the whole was offered; or though the *Vaſſal* was *minor*, then the *Vaſſal* looſes his *Feu*, *ob non ſolutum Canonem*; for the *Feu duty*, is called *Canon*; and if this proviſion be expreſt

Part 2. Tit. 5.

in his *charter*, he will not be allowed to purge this *irritancy*, by offering the bygones at the *Barr*; but though this *proviſion* be not expreſt in the *charter*, yet the *feu* will be *annulled* for not payment of the *Feu-dutie*, by an expreſs *act of parliament**; but the *Vaſſal* in that caſe will be allowed to purge at the *bar*, and the reaſon of this difference is; becauſe the *expreſs paction* is thought a ſtronger Tye than the *meer ſtatute*.

*K. J. 6. Par. 15. act 226.

A *clauſe irritant* in *Our Law*, ſignifies any *proviſion*, which makes a *penalty* to be incurred, and the *Obligation* to be null for the *future*; as here, where the *Superiour* gives out his Feu upon *expreſs condition*, that if the *Feu-dutie* be not payed, the *Feu* ſhall be *null*, and *reduceable*, and a *clauſe reſolutive*, is a *proviſion*

viſion, whereby the *Contract* to which it is affixt, is for not *performance*, declared to have been *null* from the beginning. Part 2. Tit. 5.

The *Caſualities* that are due, by all manner of *holdings*, and which ariſe from the very *nature of the feu*, without any *expreſs paction*, are *None-entry*, *Relief*, and *Liferent Eſcheate*.

None-entry, is a *caſuality* whereby the *Superiour* has *right* to the *Meals* and *Duties* of the *Lands*, when there is not a *Vaſſal* actually entered to him, and the reaſon why this is due to him, is, becauſe, he having given out his *Feu* to his *Vaſſal* or *ſervice*, when there is no *actual Vaſſal* entered, the *Law* allowes him to have *recourſe* to his own *Feu*, that he may therewith provide himſelf with

Part 2. Tit. 5.

with a *Vaſſal*, who may ſerve him; but though the full Rents of the Lands be due to the *Superiour*, from the very time that he cites his *Vaſſal*, to *hear*, and *ſee*, it *found* and *declared*, that the Land is in *None-entrie*; yet before that *citation*, the *Superiour* gets onely the *retoured duties*; and the reaſon of the difference is; becauſe after *citation*, there is a greater contempt than before, and ſo is to be more ſeverely puniſhed.

For underſtanding which *retour dutie*, it is fit to know, that there was of old, a *general valuation* of all the *Lands of Scotland*, but thereafter there was a *new valuation*, the firſt whereof is called *the old*, and the ſecond, *the new Extent*, and both are called the *Retour duty*, becauſe

becauſe they are expreſt in the *Retour*, (or *Return*) that is made to the *Chancellary*, when an *Heir is ſerved*; but both are very far below the Value, to which Lands are now *improved*, though in *Our Law*, the *new extent* be conſtructed to be the Value. Part 2. Tit. 5.

But in an *infeftment of annualrent*, the whole *annualrent* is due, as well before *declarator*, as after; becauſe the *annualrent* is the *retoure dutie*, it being *retoured*, *valere ſeipſum*; and that is called *an infeftment of annualrent*, when the *Vaſſal* is not *infeft* in *particular lands*; but is infeft in an *yearly annuity of money*, to be payed out of the *lands*, as for inſtance, if a man ſhould be infeft in the ſum of *five hundred merks yearly*, to

Part 2. Tit. 5.

to be payable out of any particular *Lands*, being *worth* 5000. merks yearly, how ſoon the Vaſſal who had right to the 500. merks dyed, the Superiour would have right to the whole 500 merks yearly, until the Heir of the Vaſſal be entered. *vide infra Tit. Servituds, & annualrents.*

There is no *Nonentry* due in *Burgage Lands*; becauſe the *Burgh* it ſelf is *Vaſſal*, and never dyes, and ſo therefore, neither does the *Burgh* nor any private *Burgeſs* pay *nonentrie*, the duty payable by a Burgh, being onely by *Watching* and *Warding*.

When the *Vaſſal* enters, he pays an acknowledgment to the *Superiour*, which is called, *relief*, becauſe its payed for reliving

ing

ing his *land* out of the *Superiors* Part 2.
hands. It is *debitum fundi*, and Tit. 5.
affects not only the *ground really*, but the *Vaſſal Perſonally*, who takes out the precept for *infefting* himſelf; though he never takes *infeftment* thereupon.

The value of this Caſuality varies, according to the nature of the holding, for in Blench and Feu holdings, it is only the double of the *Feu* or *Blench duties*; but in *Ward-holdings*, it is the *full duty* of the *land*; if the *Superiour* be in poſſeſſion, the time of the *Vaſſals entrie*; but if the *Superiour* was not in *poſſeſſion*; though the *Vaſſall* was *minor*, or if the *Vaſſall* be *major*, before his *Predeceſſor* dye, then the *Superiour* gets only the *retour* dutie; and it

Part 2. Tit. 5.

is ſo far from being preſumed to be *remmitted* by the *Superiours* entering his *Vaſſal*; that it is ſtill *exacted*; though it be gifted with the other *Caſualities*.

For underſtanding *Life-rent Eſcheates*, it is fit to know; that when any man does not pay a *debt*, or perform a *deed* conform to his *Obligation*, his *Obligation* is *Regiſtrated*; if it carry a *conſent* to the *Regiſtration* in the body of it; or if it do not, there muſt be a *ſentence recovered*, and upon that *Regiſtrated writ*, or *decreet*, (for a *Regiſtrated writ* is a *decreet* in the *Conſtruction of Law*) there will be *Letters of horning* raiſed, and the *Partie* will be charged, and if he pay not within the dayes allowed by the

the *charge*, he will be *denounced Rebel*, and put to the *Horn*, and from the very day of the *denounciation*, all his *moveables falls to the King by a caſualitie*, which is called, *ſingle Eſcheate*; but now *ſingle Eſcheates* fall likewiſe to *Lords of Regalities*, if the perſons *denounced* live within a *Regality*, becauſe the *King* has gifted all *ſingle eſcheates* when he erected thoſe *Regalities*. part 2. Tit. 5.

If the *Vaſſal* continue *year* and *day Rebel*, without *Relaxing* himſelf, (which *Relaxation* is expede by *Letters* under the *Kings ſignet*, expreſly ordaining him to be *relaxed from the Rebellion*;) then he is eſteemed as *Civilly dead*; and conſequently not being able to ſerve the *Superiour*, the *Law*

Part 2. Tit. 5. gives the *Superiour* the *meals* and *duties* of his *Feu*, during all the dayes of the *Vaſſals* life; and this *caſuality* is called *Liferent Eſcheat*; ſo that every *Superiour* aſwell as the *King*, has right to the *meals*, and *duties* of the *lands* holden of *himſelf* * if his *Vaſſal* was once *infeft*; and even though he was not *infeft*; if he was *appearand Heir*, and might have been *infeft*; for his lying out ſhould not *prejudge* his *Superiour*; but if a man have right by *diſpoſition*, whereupon no *infeftment* followed, the *King* only will have right to his *Life-rent Eſcheate*, as he has for the ſame reaſon to the *Manſes* and *Gleebs* of *Miniſters*, when they are *Rebells*; ſince they are not *infeft* in theſe; but all *heritable* and *Life-rent Rights*, requiring

*K. J. 5. Par. 4. Act 32.

no

no *infeftment* of their own *nature*, ſuch as a *terce*, and *Life-rent-tacks* fall not to the *King*, and the *Life-rent tacks* fall to the *Maſter of the ground*, and the *Life-rent* by *Terce* pertains to the *Superiour* during the *Life-renters Lifetime* *. Par: 2. Tit. 5.

*K. J. 6. Par. 22. Act 15.

This *Life-rent Eſcheate* comprehends only *Rights*, to which the *Vaſſal* himſelf had right for his *Lifetime*; for elſe it will fall under *ſingle Eſcheate*; (*ſingle Eſcheates* comprehending every thing that is not a *Life-rent Eſcheate*;) and therefore, if the *Superiour* having right to the *Vaſſals Liferent Eſcheate*, become *Rebel* himſelf, the *Vaſſals Liferent Eſcheate* will fall under the *Superiours ſingle Eſcheate*, for the *Superiour* had not right to thoſe *meals* and

Part 2. Tit. 5.

duties during all the dayes of his own *Lifetime*; and ſo it could not fall under his *Liferent*, and the like, does for the ſame reaſon hold in all ſuch as have *aſſignations* to *Liferents*, or to *Liferent Eſcheats*, or to *Tacks* for any definit number of years, few or many.

The *Superiour* has alſo right to the *Sub-Vaſſals Liferent Eſcheate*, which falls after the *Vaſſals denounciation*, for by the *denounciation of the immediate Vaſſal*, the *Superiour* comes in his place; and ſo has right to the *ſub-Vaſſals Liferent*.

The *Liferent Eſcheate falls* by the *Rebellion*, that is to ſay, by the *denounciation*; and the *year* and *day*, is given only to

to the *Rebell* to *relax himſelf*, ſo that if he *relax* not within that time, his *Liferent* will *fall from the denounciation.* Part 2. Tit 5.

In competition betwixt the *Superiour of the Rebell*, and the *Rebells Creditors*, theſe Rules are obſerved in our *deciſions.*

Primo, No *Legal Diligence*, nor *Voluntar right* for payment of any debt contracted, after *Rebellion*, will *prejudge* the *Superiour*; for elſe after a *Vaſſal* were at the *horn*, he might *fraudulently* contract debt to *prejudge* the *Superiour.*

Secundo, If the *debt* was *prior* to the *denounciation*, no *voluntar infeftment* will prejudge the *Superiour*; except the *Rebel* was obliged prior to the *Rebellion*,

Part 2. Tit. 5.

to grant that *infeftment*, and that the *infeftment* it ſelf was expede within *year and day* of the *denounciation.*

Tertio, Though *Legal Diligence* be more favourable then *voluntar rights*; becauſe there is leſs *colluſion*, yet no *legal dilligence* will be preferred to the *Superiour*; except it was led for a debt prior to the *denounciation*, and was compleated by *infeftment*, or *charge*, within *year* and *day*, thereof; albeit the ſaid *Legal diligence* was deduced after the *denounciation.*

Though this be the courſe in competitions, *quo ad liferent Eſcheates*; yet actual payment made, or *diligences* done to, or by *Creditors* for payment of

debts

debts, prior to the *Rebellion*, or the *commiſſion* of *crimes*, will be preferred, to the *donator*; if theſe *Rights* or *Diligences* be compleated before *declarator*, which we owe rather to the *benignity* of our *Kings*, than to the *Nature* of theſe *Rights*, ſince there is *jus queſitum fiſco*, by the *denounciation.*

Liferent Eſcheates is proper to all kinds of holding; except *Burgage*, and *mortification*; for the *Vaſſal* being a *Societie* or *Incorporation* dyes not, and ſo can have no *liferent Eſcheate*; and albeit the *adminiſtrators* were *denounced* for *debts* due by the *Incorporation*; yet that is ſtill preſumed to be their *Negligence*, which ought not to prejudge the *Societie*:

For compleating this *Caſualitie*

Part 2. Tit. 5.

to grant that *infeftment*, and that the *infeftment* it ſelf was expede within *year and day* of the *denounciation*.

Tertio, Though *Legal Diligence* be more favourable then *voluntar rights*; becauſe there is leſs *colluſion*, yet no *legal dilligence* will be preferred to the *Superiour*; except it was led for a debt prior to the *denounciation*, and was compleated by *infeftment*, or *charge*, within *year* and *day*, thereof; albeit the ſaid *Legal diligence* was deduced after the *denounciation*.

Though this be the courſe in competitions, *quo ad liferent Eſcheates*; yet actual payment made, or *diligences* done to, or by *Creditors* for payment of

debts

debts, prior to the *Rebellion*, or the *commiſſion* of *crimes*, will be preferred, to the *donator*; if theſe *Rights* or *Diligences* be compleated before *declarator*, which we owe rather to the *benignity* of our *Kings*, than to the *Nature* of theſe *Rights*, ſince there is *jus queſitum fiſco*, by the *denounciation*.

Liferent Eſcheates is proper to all kinds of holding; except *Burgage*, and *mortification*; for the *Vaſſal* being a *Societie* or *Incorporation* dyes not, and ſo can have no *liferent Eſcheate*; and albeit the *adminiſtrators* were *denounced* for *debts* due by the *Incorporation*; yet that is ſtill preſumed to be their *Negligence*, which ought not to prejudge the *Societie*:

For compleating this *Caſualitie*

Part 2. Tit 5.

a general *Declarator* muſt be raiſed at the *Superiour* or *Donators* inſtance, to *hear* and *ſee* it *found* and *declared*, that the *Vaſſal* was orderly *denounced Rebel*, and has continued at the *Horn year* and *day*. And in a *competition* betwixt *Donators*, the laſt *gift* if firſt declared, will be preferred.

If the *gift* be taken to the behoove of the *rebell*, it is *null*, and is preſumed to be to his behoove, if he or his *Family* be ſuffered to ſtay in *poſſeſſion*.

The laſt Priviledge of the *Superiour* is, that he may *force his Vaſſal to exhite his Evidents*, to the end he may know what is the *nature of the holding*, and in what he is *lyable to his Superiour*, which proceeds ordinarly by an *Action of Improbation*.

Title

Title VI.

Of the Right which the Vaſſal acquires by getting the Feu.

THE *Vaſſal* by getting the *Feu* ſettled in his Perſon, by *Charter* and | *Seaſin*, as ſaid is, has right to all Houſes, Caſtles, Towers, (but not Fortalices;) Woods, and other things that are above ground of the Lands *expreſly diſponed*; and to Coals, Limeſtone, and other things within *ground*, and to whatever has been *poſſeſſed*, as *part* and *pertinent* of the Land *paſt memorie of Man*: But there are ſome things which paſſe not under the *general diſpoſitive words*, and require a *ſpecial Diſpoſition*, which belong to the *King*,

in

Part 2. Tit. 6.

in an eminent way, and are called therefore *Regalia*, and are not preſumed to have been *diſponed* by his *Majeſtie*, or any other *Superiour*; except they were *ſpecially mentioned*, ſuch as are all *Juriſdictions*, Forreſts, Salmond-fiſhings, Treaſures hid within the *ground*, and Gold, Silver, and Fine-lead; for other Mines, ſuch as Iron, Copper, *&c.* belong to the *Vaſſal.*

If Lands be erected in a *Barrony* by the *King*, then though the lands lye *diſcontiguouſly*, one *ſeaſin* will ſerve for them all, becauſe, *Barrony* implyes an *union.*

This erecting them in a *Barrony*, will likewiſe carry a right to *Juriſdictions*, and *Courts*, *Fortalices*, *Forreſts*, hunting of *Deer*, and Ports, with their

their ſmall Cuſtomes, granted by the *King*, for upholding theſe Ports, Milnes, Salmond-fiſhings, *&c.* becauſe; *Barronia eſt nomen univerſitatis*, and poſſeſſion of any part of a *Barrony* is repute poſſeſſion of the whole; But Mynes of Gold, and Silver, * Treaſures, and goods confiſcate, are not carried with the *Barrony*. Part 2. Tit. 5. *K. J. V. Par. 1. act 12.

The *Heritor* has alſo power to ſet *Tacks*, remove, and in-put *Tennents*, as a conſequence of his *property*.

A *Tack* is a *Location*, or *contract*, whereby the uſe of any thing is ſet to the *Tacksman*, for a certain hyre, and in *Our Law* it requires neceſſarly, that the *terms* of the *Entry*, and the *Iſſh*, muſt be expreſt, that is to ſay, when it ſhould begine and end, and it muſt bear a par-

Part 2. Tit. 6.

particular dutie, elſe it is null; and if it be a *valid Tack*, that is to ſay, if *Write* be *adhibit*, (*verbal Tacks* being onely *valid* for one year) to the thing ſet, the *Contracters names*, *Tack-duty*, *Iſh*, and *Entry*, clearly therein expreſt, and cloathed with *poſſeſſion*, it will defend the poor *Tacksman*, againſt any *Buyer* *; and even againſt the *King* and his *Donators*, when they *ſucceed* by *forfeiture*, which was *introduced in favours of poor Tennents*, for encouraging them to improve the *land*; but it will not defend againſt a *Superiour of ward lands*, *for the ward*, *&c.* though by *Act of Parliament*, the *Superiour* be obliged, to continue them in their *poſſeſſion* till the next *term of Whitſonday* *.

‡K. J. 2. Par. 6. Act 17

*K. J. 4. Par. 3. act 26.

Albeit *Tacks* have not all the

the *ſolemnities* foreſaid; yet they are *valid* againſt the *Granter* and his *Heirs.* Part 2. Tit. 6.

Tennents cannot aſſign their *Tacks*; except they be *Liferent Tacks*; or that the *Tack* bear a power to *aſſign*; but they may be compryſed, or *adjudged*; and if the *Maſter* ſuffer the *Tacksman* to continue after the *Tack* is expyred, he will be obliged to pay no more than he payed *formerly* during the *Tack*; and this is called in *Our Law*, the benefite of a *tacite Relocation*, that is to ſay, both the *Setter* and the *Tacksman*, are preſumed to deſign to continue the *Tack* upon the *former terms*, till the *Tennent* be warned.

If the *Tack* be granted to *ſub-*

Part 2. Tit. 6.

ſub-tennents; then the *Tackſman* may ſet a *ſub-tack*, which will be as *valid* as the *principal Tack*, if *cled* with *poſſeſſion*.

Rentals are alſo a kind of *Tacks*; but more *favourable* and *eaſie*; becauſe the *Rentaller* and his *Predeceſſors* have been *Ancient Poſſeſſors*, and *kindly Tennents*, and he payes a *Graſſume*, or *acknowledgement* at his *entrie*, and yet they laſt no longer than *for a year*; if there be no time expreſt; and if they be granted to a *man* and his *Heirs*, they laſt only to the *firſt Heir*; for elſe they behoved *for ever to belong to the Heirs*; and ſo would want an *Iſh*; but no *Tack* is accounted a *Rental*; except it be in *write*, and the write bear the ſame.

Rentals

Rentals cannot be aſſigned, except that power be granted in the *Rental*; and if the *Rentaler* aſſign, he looſes his *Rental*; though a *Tacksman* Forfeits not his Right, by *aſſigning* it, the *aſſignation* being only *null.*

When the years of the *tack expyre*; or though there be no Tack; yet the *Maſter* cannot *Summarly remove his Tennent*, or *Poſſeſſor* except from *Life-rented Lands*, and *Houſes*, or *Towers*, and *Fortalices*, and *vitious Poſſeſſors* whom he can remove by a *ſummonds* on ſix *days*; but in all other caſes he muſt warn him, 40 dayes, before the *term of Whitſonday*; tho the *term* at which he were to remove, *by paction*, were *Martinmaſs*, or *Candle-*

Part 2. Tit. 6.

Candlemaſs; which warning muſt be executed, that is to ſay, *intimated perſonally to the Tennent*, and upon the *ground of the lands*; and at the *Pariſh Kirk*, immediately *after Sermon*, and if he then *refuſes*, he muſt be perſued to remove *upon ſix dayes*, and after this citation, the *Maſter* will get againſt him *violent profits*; that is to ſay, the *double of the avail of the Tenement within Burgh*, and the higheſt advantages that the *Heritor* could have got, if the *Tennent* poſſeſſed lands, in the *Countrey*; nor will the *Tennent* be allowed to defend againſt this removing; till he *find caution* to pay the *violent profits* *.

*Q. Ma Par. 6. Act 39.

The *Maſter* has likewiſe a *Tacit Hypotheque* in the *fruits of the*

the ground, which he ſets to his *Tennent*, in ſo far as concerns a *years dutie*, that is to ſay, they are *impignorat by the Law*, for that *years dutie*, and he will be *preferred* either to a *Creditor*, who has done *diligence*, or to a *ſtranger* who has bought them; though in a *publick mercat*: And a *Lands-Lord* within *Burgh*, has a *tacit hypotheque* in all the goods brought in to his *Houſe*, by his *Tennent*, which he may retain, *ay*, and while he be payed of his *years rent*.

Title

Title VII.

Of Tranſmiſſion of Rights, by Confirmation, and of the difference betwixt Baſe, and Publick Infeftments.

THE *Fie* being thus *Eſtabliſhed* in the *Vaſſals perſon*, the ſame may be *Tranſmitted*, either to *univerſal*, or *ſingular Succeſſors*, the firſt is properly called *Succeſſion*, which ſhall be handled in the *third-Book*. *Tranſmiſſion of Rights*, to *ſingular Succeſſors*, is *voluntar* by *diſpoſition*, and *aſſignation*, or neceſſar by *appryſing*, and *adjudication*, and *Confiſcation*, when they are *forefaulted for crimes*, &c.

If

If the *Vaſſal* ſells the Land, the *Superiour* is not obliged to receive the *Sub-Vaſſal* except he pleaſes, though the *charter* bear, to him and his *aſſignies*; and *if* he receive him, there is in *Law*, *a years rent due to the Superiour*, as an *acknowledgement for changing his Vaſſal*. Part 2. Tit. 7.

Lands are diſponed, either to be *holden of the diſponers Superiour*, and that is called a *publick Infeftment*; becauſe, it is preſumed it will be publickly known, being *holden of the Superiour*; and it is likewiſe called an *Infeftment*, *a me*; becauſe, the *diſponer* gives it to be holden *a me*, *de Superiore meo*, and this *Infeftment* is null, untill it be confirmed * by the *Superiour*, which is done by a *Charter of Confirmation*, wherein the *K. J. 6. Par. 5. Act 66.

Title VII.

Of Tranſmiſſion of Rights, by Confirmation, and of the difference betwixt Baſe, and Publick Infeftments.

THE *Fie* being thus *Eſtabliſhed* in the *Vaſſals perſon*, the ſame may be *Tranſmitted*, either to *univerſal*, or *ſingular Succeſſors*, the firſt is properly called *Succeſſion*, which ſhall be handled in the *third-Book*. *Tranſmiſſion of Rights*, to *ſingular Succeſſors*, is *voluntar* by *diſpoſition*, and *aſſignation*, or neceſſar by *appryſing*, and *adjudication*, and *Confiſcation*, when they are *forefaulted for crimes*, &c.

If

If the *Vaſſal* ſells the Land, the *Superiour* is not obliged to receive the *Sub-Vaſſal* except he pleaſes, though the *charter* bear, to him and his *aſſignies*; and *if* he receive him, there is in *Law*, *a years rent due to the Superiour*, as an *acknowledgement for changing his Vaſſal*. Part 2. Tit. 7.

Lands are diſponed, either to be *holden of the diſponers Superiour*, and that is called a *publick Infeftment*; becauſe, it is preſumed it will be publickly known, being *holden of the Superiour*; and it is likewiſe called an *Infeftment*, *a me*; becauſe, the *diſponer* gives it to be holden *a me*, *de Superiore meo*, and this *Infeftment* is null, untill it be confirmed * by the *Superiour*, which is done by a *Charter of Confirmation*, wherein the *K. J. 6. Par. 5. Act 66.

Part 2. Tit. 7.

the *Superiour narrates the Vaſſals Charter*, and ſubjoyns thereto his own *Confirmation* or *Ratification of it*, and the laſt right being firſt confirmed is ſtill *preferred*.

Sometimes alſo the *Vaſſal* Diſpones Lands to be holden of himſelf, and this is called, *a baſe infeftment*, and has been allowed by *Our Law*, contrare to the principles of the *Feudal Law*, in Favours of *Creditors*, who getting *right for payment of* their *debts*, were unwilling to be at the *expences* to get a *Confirmation* from the *Superiour*, and this is called, an *infeftment*, *de me*; becauſe, the *Diſponer* gives them *tenendas de me, & ſucceſſoribus meis*.

Theſe *baſe infeftments* being cloathed

cloathed with *poſſeſſion*, are as *perfite*, and *valid*, as a *publick infeftment*; for *poſſeſſion*, is to an *infeftment* to be holden of the *Diſponer*, the ſame thing that *confirmation* is to an *infeftment* to be holden of the *Superiour*; and therefore, as in a Competition betwixt two *infeftments* of the ſame Land, to be holden of the *Superiour*, the firſt *confirmation* would be preferred, it being a general rule in *Law*, that amongſt Rights of equal perfection, *prior in tempore eſt potior in jure*; ſo if a *baſe infeftment* be cloathed with *poſſeſſion* before the *publick infeftment* be confirmed, the *baſe infeftment* will be preferred; though it was granted after the *publick infeftment*. Part 2. Tit. 7.

For the better underſtanding

Par. 2. *Tit.* 7.

ing of the nature of *baſe infeftments*, it is fit to know, that *poſſeſſion* is in *Law natural*, or *Civil*, that is *Natural poſſeſſion*, by which a man is *Naturally*, and *Corporally* in *poſſeſſion*, as by labouring of the ground; but becauſe ſometimes *men* could not attain to the *Natural poſſeſſion*, for cloathing their Right, therefore the *Law* was forced to allow another *poſſeſſion* by the *mind*, as that was by the *body*, and this is called, *Civil poſſeſſion*; becauſe it is allowed, and introduced by the *Civil Law*, of which there are many kinds in *Scotland*; As,

Primo, The obtaining *Decreets for Meals and Duties*, and even *citation* upon an *heritable Right*.

Secundo, Payment of *annual-*

rent

rent, by the *debitor* to the *Creditor* who has *infeftment of annual-rent.* Part 2. Tit. 7.

Tertio, If a man be *infeft in lands*, and for *warrandice* of these lands be *infeft* in other lands, possession of the principal lands, is reputed in the *construction of Law*, possession of the *warrandice lands.*

Quarto, If a Woman be *infeft* by her Husband in a *liferent*, the *Husbands possession* is accounted the *Wifes possession.*

Quinto, If a Man *dispone* lands, reserving his own *liferent*, the *Liferenters possession* is accounted the *Fiars possession*; and a *base infeftment* is said to be cloathed with *possession*; if he who is *infeft* hath attained either to *Natural* or *Civil possession*; for the *Law* cannot punish a Man for not *apprehending possession*, who

Part 2. Tit. 7.

could not *apprehend* it; and for the ſame reaſon, if the time of *Entrie* was not come, he who is *infeft* by a *baſe infeftment*, will be preferred in that caſe, as if he were in *poſſeſſion*; and the reaſon of all this is, becauſe *Our Law* conſidering, that *baſe infeftments* were *clandeſtinely* made, betwixt *confident*, and *conjunct perſons*, to the ruine of *lawful Creditors*; who could not know the ſame; there being then no *Regiſter of Seaſins*; it therefore declared all *baſe infeftments* to be ſimulat, which were not cloathed with poſſeſſion; and *therefore before the terme*, at which he who got the *baſe infeftment* could enter to the poſſeſſion, there could be no *Simulation*, nor *fraude*, in no partie; and in this the

the *Law* conſiders much the intereſt *of lawful Creditors*, by ſuſtaining that kind of poſſeſſion in their *favours*, which would not be ſuſtained in *favours of near Relations*; or where there is no *Onerous cauſe*; and thus a *baſe Infeftment* given be the *Father*, to his own *Son*, will not be cloathed with poſſeſſion, by the reſervation of the *Fathers liferent*, though the reſervation of the *Fathers Liferent* would cloath a *baſe infeftment* granted by him to a *lawful Creditor*; and the *Husbands poſſeſſion* is accounted the *Wifes poſſeſſion*, in ſo farr as concerns her *principal Joynture*; but not in ſo far as concerns her *additional Joynture*, in a *competition* betwixt her and her *Husbands lawful Creditors*.

Sometumes likewiſe, for the

Part 2. Tit: 7.

more ſecurity a *baſe infeftment*, which is given to be holden of the *Diſponer*, will be confirmed by the *Superiour*; but that *Confirmation* does not make it a *publick infeftment*; for no *infeftment* can be called a *publick infeftment*; but that which is to be holden of the *Superiour*; but the uſe of that *Confirmation* is, that after the *Superiour* has confirmed voluntarly the *ſub-Vaſſals Right*, he thereby acknowledges his Right; and conſequently, can ſeek no *Caſuality*, which aryſes upon want of the *Superiours conſent*, ſuch as *Forfeiture*, or *Recognition*; But becauſe the *Diſponer* is ſtill *Vaſſal*, therefore his *Superiour* will ſtill have right to the *Rents of the Lands*, by his *liferent Eſcheate*, and to *Wards*, and *Nonc-entries* by his death; but

if

if the *Superiour* enter the *ſub-Vaſſal* onely upon a Charge, (this being no *voluntar act* of his,) that does not cut him off from thoſe *caſualities*.

Sometimes likewiſe, the *Seller* reſigns the Lands in *favours of* the *Superiour*, if the lands be ſold to the *Superiour himſelf*, which is called *Reſignatio ad Remanentiam*; becauſe the Lands are reſigned to remain with the *Superiour*, and in that caſe, the *property* is ſaid to be *Conſolidate* with the *Superiority*, that is to ſay, the *Superiour returns to have all the right both of Property, and Superiority*; nor needs he be *infeft of new*; becauſe, as we *formerly* obſerved the *Superiour* ſtands ſtill *infeft* aſwell as the *Vaſſal*; but the *Inſtrument of Reſignation* muſt be Regiſtrated

Part 2. Tit. 7.

ed in this caſe, as *Seaſins* are in other caſes, to put *men in mala fide* to buy *.

*K. C. 2 Par. 2. Seſſ. 1. Act 3.

The other *Reſignation*, is called *Reſignatio in favorem*, which is when the *Seller* having ſold his *Feu* to a third *party*, reſigns the *Feu* in the *Superiours hands*, for new *Infeftment* to be given by the *Superiour* to that third *partie*.

The *warrand* of both theſe *Reſignations* is a *Procuratorie* granted by the *Seller*, to a *blank Perſon*, (and this *warrand* is ordinarly inſerted in the *diſpoſition*) impowering him to *reſign the Feu in the Superiours hands*; and this is called a *Procuratory of Reſignation*; and the *Symbols of the Reſignation* are, that it is to be made by *Staff* and *Baſton*; and accordingly, the *Procu-*

rator

rator compears before the *Superiour*, and upon his *Knee*, holding a *Staff* or *Pen* at the one end, which the *Superiour* or any having *power from him*, holds by the other, he there *reſigns the Feu*, either *ad remanentiam*, or *in favorem*, as ſaid is; whereupon an *inſtrument* is taken by the Perſon in whoſe *favours* the *Reſignation* is made, which is called the *Inſtrument of Reſignation*; and thereafter the Perſon in whoſe *Favours* the *Reſignation* is made, (if he be not the *Superiour*) is *infeft*, and his *Seaſin* muſt be *Regiſtrated* within 60. *dayes*, as ſaid is.

The *Reſignation* does not perfectly *denude* the *Seller*, untill *Infeftment* be taken upon it; and therefore the *firſt Infeftment*, upon a *ſecond Reſignation*

Part 2. Tit. 7.

will be *preferred* to him, who has but the *ſecond infeftment* upon the *firſt reſignation*; but yet the Lands will be in *Non-entrie* in the *Superiours* hand, after the *reſignation* is made, untill the *perſon* in whoſe *favours* it was made be *infeft*, *for* otherwayes the *ſuperiour* would want a *Vaſſal*, ſince he could not call him *Vaſſal* who did reſign his to be *Vaſſal*; And he had accepted of a *reſignation* from him; nor is the Perſon in whoſe *favours* the *reſignation* is made his *Vaſſal*; ſince he is not yet *infeft*; but yet the *buyer* has a *perſonal action*, againſt the *Superiour*, to *force* him to *denude* himſelf in his *favours*; ſince he has accepted the *reſignation*; and he will likewiſe have an *action of damnage* and *intereſt* againſt the *Superi-*

Superiour; if he accept a *ſecond Reſignation*, whereby a *prior infeftment* may be taken to his *prejudice*, and the *Superiour* gets all his *Caſualities*, *as Ward*, *Marriage*, *Liferent Eſcheat*, *&c.* not by him in whoſe *favours reſignation* is made; but by him who *reſigns*, ſince he remains ſtill *Vaſſal* till the other be *infeft quoad* the *ſuperiors caſualities*. Part 2. Tit. 8.

Title VIII.

Of Redeemable Rights.

ANother *Conſiderable diviſion of Heritable rights* with us, is that ſome are *redeemable*, and ſome *irredeemable*.

Redeemable Rights, are theſe which return to the *Diſponer*, upon payment of the

Part 2. Tit. 8.

ſum, for which theſe Rights are granted; and are ſo called; becauſe they may be *redeemed* by the *Diſponer*; and they are either *Wadſets*, *infeftments of annualrents*, or *infeftments for relief*.

A *Wadſet*, is a right whereby lands are *impignorated* or *pledged* for *ſecurity* of a ſpecial ſum, which paſſes by *infeftment*, (like other real Rights) in the terms of *alienation* or *diſpoſition*; and the *Diſponer* does ſecure himſelf by getting a *reverſion* from the *Buyer*, wherein he *grants* and *declares* the Lands *redeemable from him*, upon payment of the ſum then delivered, and *of the annualrent* thereof, which is *pactum de retrovendendo*; and expreſſes the *place* and *time* when it is to be *delivered*, and in whoſe *hands* it is to be *conſigned*; in caſe the receiver

receiver of the *Wadſet*, (who is called the *Wadſetter*) refuſe to accept his Money. Part 2. Tit. 8.

Theſe *Reverſions*, being againſt the *nature of property*, and depending upon the meer agreement of Parties, are to be moſt ſtrictly obſerved; and are *ſtrictiſſimi juris*; ſo that they are not extended to *Heirs* or *Aſſigneys*; except they be *expreſt*, and muſt be *fulfilled* in the very terms; and it is not enough that they be *fulfilled* in *equipollent terms*: But after an order of *redemption* is uſed; that is, after the *Granter* of the *Wadſet* has duely premoniſhed the *Wadſetter*, and conſigned the ſums due by the *Wadſetter*, it may be aſſigned; and though the *reverſion* bears that *premonition* be made at the *Pariſh Church*, it will be ſuſtained if it

Part 2. Tit. 8.

it be made perſonally to the *Wadſetter*, for that is a ſurer *certioration.*

Reverſions, albeit of their own nature they are *perſonall binding*, onely the *Granter* and his *Heirs*, yet they are *real rights by our Statutes*, and affect ſingular * *Succeſſours.*

*K.J.3. Par. 5. Act 28.

They and all Bands to make *reverſions*, or eikes to *reverſions*, muſt be regiſtrated within 60. dayes in the ſame Regiſter with *Seaſins*; for elſe a *ſingular Succeſſour* is not obliged to regard them*; ſo that if any buy the Land *irredeemably*, and *compleat* his *right*, he will be *preferred*; but they are ſtill valid againſt the *Diſponer* without *regiſtration.*

*K.J.6. Par. 22. Act 16.

When the *Granter* of the *Wadſet*, is to uſe an Order of *redemption*, he muſt premoniſh the

the *Wadſetter* to compear, (and take *inſtruments* thereupon, called, an *inſtrument of premonition*) to receive payment of the ſumes due to him; and at the *time* and *place* appointed by the *reverſion*, offer being made of the Money; if the *Wadſetter* refuſes voluntarly to *renounce*, and to *accept his money*, it is conſigned in the hands of the perſon deſigned in the *reverſion*, or if no perſon be deſigned, it may be *conſigned in* any *reſponſal Mans hand*; but there muſt be a *paper* taken under the *Conſignatars hand*, acknowledging that it was *conſigned in his hand*; for though an *inſtrument* under a *Notars hand*, proves that all this order of *redemption* was uſed; yet it will not prove the *receipt* of a ſum againſt the *Conſignatar*.

If

Part 2. Tit. 8.

If the *Wadſetter* receive his Money, and *renounce voluntarly*, this is called, a *voluntar redemption*; But, becauſe though *renounciations* be ſufficient to extinguiſh, they are not ſufficient to *tranſmit a right*; therefore, if the *Wadſet* was given to be holden of the *Diſponer*, the *Wadſetter* muſt reſign *ad remantiam*, in the *Diſponers hands* as his *Superiour*; and thereafter the *Diſponer* needs not to be *infeft of new*; as no *Superiour* needs; but if the *Wadſet* be given to be holden of the *Superiour*; then the *Diſponer* uſes to take a *Letter of regreſs*, whereby the *Superiour* obliges him to receive him back to be his *Vaſſal*, when he ſhall *redeem his own lands*; for otherwayes after the *Wadſetter* is ſeaſed, the *Superiour* is not obliged

obliged to receive him back.

If the *Wadſetter* refuſes to renounce after the Order is uſed, the *Lords* will *force him to renounce*, and *declare the Lands redeemed*, by a Proceſs, called *a Declarator of Redemption*; after which *Decreet* is obtained, the Lands are *redeemed*, and belong to the *Redeemer*; and the *Wadſetter* will upon a *ſimple charge of horning* force the *Conſignatar* to deliver him up the *money*.

The uſer of the *Order of Redemption*, may paſs from it at any time *before Declarator*; and therefore the ſumes for which the *Wadſet* was granted, are ſtill *heritable* before *Declarator*; but after that they are moveable, and fall to *Executors*; except

Part 2. Tit 8.

cept the *Declarator* be obtained after the *Wadſetters death*, in which caſe they remain *heritable*; And though the *Wadſetter* require his Money, he may paſs from his *requiſition*, either *directly* by a clear *Declaration* that he paſſes from it, or *indirectly* by intrometting with the *duties of the Wadſet lands*, or by taking *annual-rent for termes ſubſequent to the requiſition.*

Wadſets are either *Proper*, or *Improper.*

Proper Wadſets, are theſe, wherein the *Wadſetter* takes his hazard of the *rents* of the land for the *ſatisfaction of his annual-rent*; and payes himſelf all *publick burdens.* *Improper Wadſets*, are theſe, wherein the *Granter* of the *Wadſet* payes the *publick burdens*, and the *receiver* is

is at no hazard, but has his *annualrent ſecure*. And if a *Wadſet* be taken, ſo, that the *Wadſetter* is to have more than his *annual-rent*; and yet the *Granter* is to pay the *publick burdens*, this is accounted *Uſury* by *Our Law*; the puniſhment whereof is *confiſcation of moveables* looſing of the *principal ſum* and anulling the *uſury*, *contract*, or *paction**; and by a late Statute, *If the Debitor offers ſecurity for the Money, and craves poſſeſſion, the Wadſetter muſt either quit his poſſeſſion, or reſtrict himſelf to his annualrent* *. And if a Man *impignorat* his Lands, or Bands, with expreſſe condition, that *if the Money be not payed at a preciſe day, they ſhall not be thereafter redeemable:* The *Law* reprobates this unjuſt advantage, called, *pactum legis commiſſoriæ*

Part 2. Tit. 8.

*K.J.6. Par. 14. act 222. Par. 15. act 247. *King Char. 2. par. 1. Act 62.

in

Part 2. Tit. 8.

in pignoribus ; and will allow the Money to be offered at the Barr; or they will allow a ſhort time before Extracting of the *Decreet* for payment of it.

Taking of *annualrent* having been diſcharged by the *Cannon Law*, men did buy *annualrents* out of other *mens lands*, which was *the origin of our preſent infeftments of annualrent*, and *continues ſtill frequent*; by which if men reſolve not to reſt on the *perſonal ſecurity of the borrower*, they take him alſo obliged to *infeft* them in a *yearly annualrent*, payable out of his Lands correſpondent to the *ſum lent*; but if they exceed the *ordinarly annualrent* allowed *by Law*, it will *infer uſury*; and ſo they have a *double ſecurity*, *one perſonal againſt the borrower for payment*, and another

other *real againſt the ground*, it being *debitum fundi*; for which they may *poynd* any part *of the ground*; as alſo they have *good action* againſt the *Intrometters* with the *duties of the lands*, out of which there *annualrents* are payable; though they cannot *poynd* or *exact* from the *tennents* any more then they owe to their *maſter* *.

Part 2. Tit. 8.

*K. J. 3. Par. 5. act 37.

Theſe *annualrents* require a ſpecial *ſeaſin*, like *Wadſets*, and *other real rights*; the *ſymbols* whereof, if the *annualrent* be payable in *money*, is a *penney of money*; but if it be payable in *Victual*, it is a *parcel of Victual.*

This is *ſingular in infeftment of annualrent*, that *appryſing*, thereupon will be *preferred* to all *prior appryſing*, *quoad* the bygone

Part 2. Tit. 8.

bygones, of the *annualrent*; if the *infeftment* of *annualrent* *was prior* to thoſe *appryſings* to which the *appryſing* will be drawn back, and *preferred* to *any interveening right*, which *priviledge* is continued in the *late Act of Parliament*, concerning *Debitor* and *Creditor* *.

*K.C. 2 Par. 1. Act. 62.

Theſe *infeftments of annualrent*, being properly granted *for ſecurity of ſums* are *extinguiſhed* not only by *reſignations*, but by *renounciations*; and even by *intromiſſion* with as much as might pay the *principal ſum*, which *intromiſſion* is probable by *witneſs*, whether the Rent be *victual* or *money*, and therefore *ſingular Succeſſors* buying *infeftments of annualrent*, are not ſecure by any *regiſter* but muſt reſt on the *warrandice of the Seller*,

In-

Infeftments of relief, are theſe, which are granted by a *debitor* to his *creditor*, for *ſecurity of ſums owing to him*, upon which the *creditor* cannot enter to *poſſeſſion*, till he be *diſtreſſed*, and when the *ſum* is payed, the right becomes abſolutely null, as being but a *temporarie right*, and ſo the *debitor* who granted the *right*, needs not be *of new infeft*, but his former *right revives*. Part 2. Tit. 9.

Title IX.

Of SERVITUDES.

THE Nature and Conſtitution of *Propertie*, and *real Rights*, being explained in the foregoing *Titles*. We ſhall now treat briefly of *Servitudes*; which are

Part 2. Tit. 9.

are Burdens, affecting *Property* and *Rights*.

Servitudes are either *Real*, *Perſonal*, or *Mixt*.

Perſonal Servitude, is in deſuetude amongſt *Chriſtians*; and therefore is not proper to be conſidered here. *Real ſervitude* is whereby one Mans *Property*, or *Ground* is affected with ſome burden, for the uſe and behoove of another Man; which are devided in *Rural ſervitudes*, and *Citie ſervitudes*.

Rural Servitudes, are *Iter*, which is, a power of going through *our neighbours land*; *Actus*, which is a power of driving Carts, or Waines; *Via*, being the priviledge of having *high wayes* in our *neighbours ground*; and *Aquæ-ductus*, which is a power and priviledge to draw *Water alongſt their ground*

for

for watering of our own. Thus *Via*, includes *Iter*, and *Actus*, as the leſſer *ſervitudes*; ſo he that has *a Via*, has alſo power to drive carts and waines, and to walk himſelf through the Ground burdened with the *Servitude.*

2. The *City ſervitudes*, called, *ſervitutes Urbanæ*, are chiefly five.

The firſt, is *Oneris ferendi*, which is a priviledge, whereby one who has a houſe in the City, can *force the Proprietar* who has a houſe below his, to bear the burden of his houſe; and he may force the *Owner of the ſervient tenement* to repair it, and make it fit for ſupporting the *dominant tenement*, contrare to the *common nature of ſervitudes.*

Secundo, *Tigni immittendi*, which is the priviledge of

forc eing

Part 2. Tit. 9. *forceing our neighbour* to receive into his houſe the jeſts of ours.

Tertio, Stillicidii, vel fluminis, which, is whereby our *neighbor* is obliged to receive *the drops which falls from our houſe*, under which, is likewiſe comprehended the priviledge *of carrying away our Water by ſinks and channels.*

Quarto, Non officiendi Luminibus, whereby he can do nothing that can *prejudge* our Lights, or *proſpect*.

Quinto, Altius non tollendi, whereby our Neighbour cannot raiſe his houſe higher, to *prejudge* the *lights* of the *dominant Tenement.*

By *Our Law, ſervitudes* may be conſtitute by *write*, without any *ſeaſin*; becauſe they are

are *incorporeal rights*; but though a *ſervitude* meerly eſtabliſhed by *write*, be ſufficient againſt the *granter*; yet they are not *valid* againſt *ſingular Succeſſors*; except that right be cloathed with *poſſeſſion*, which compleats the *ſervitude* and makes it a *real right*; and they may be likewiſe eſtabliſhed by *preſcription* without any *write*, from him who has the *ſervient Tenement*; though he who is to acquire the *ſervitude* by *preſcription*, muſt have ſome right in his perſon, either of a *ſpecial conceſſion*, or elſe muſt *preſcrive* it, as *part and pertinent of his land.* Par: 2. Tit. 9.

The *ordinary Servitudes* ſuperadded by *us*, to theſe of the *Civil Law*, are the *ſervitudes* of caſting *Fail* and *Divot*, *common*

Part 2. Tit. 9. *paſturage*, and *Multures.*

Common paſturage, is a right *of paſturing* the *Goods* and *Cattel* of the *dominant tenement*, upon the ground of the *ſervient*, which is conſtituted frequently by a *Charter*, containing the *clauſe of common paſturage*; and ſometimes by a *perſonal Obligement*, cloathed with *poſſeſſion*; but albeit it be *indefinite*, yet it can reach no further than to the *proportion of Goods* of the *Dominant tenement*, which they keep and *fodder* in *Winter*; which is done by *ſowming* and *Rowming*, that is to ſay, the *determining the proportion of goods belonging to each Dominant tenement, according to the ſeveral Rowms and rent thereof.*

Common Paſturage in *our Law*, does

does ordinarly comprehend all the *leſſer ſervitudes*; ſuch as the caſting of *Faili* and *Divots*, preſumptively onely; for the one may be *poſſeſt* without the other; nor will *common Paſturage* interr a *ſervitude* of caſting *of fail* and *divots* if he who *poſſeſſed* the *Common Paſturage* was *interrupted* as to the caſting *of fail and divot.*

Mills, are *inter Regalia*, and require therefore a ſpecial *Seaſin*; the *Symbols* whereof are *clap* and *happer*; but if the *mill* be in a *Barrony tranſit cum univerſitate.*

Mills, are ordinarly diſpond with *multers* and *Sequels*; the *Multars* are a quantitie *of corn*, payable to the *Heritor of*

Par. 2. Tit. 9.

the mill for grinding. The *knaveſhip*, *Lok*, *and Bannock*, are a ſmall quantitie payable to the *ſervants* for their *paines*.

Theſe *quantities*, that are payed by thoſe that are *thirled*, are called, *Inſucken multurs*, and thoſe *quantities*, that are payed by ſuch as come *voluntarly*, are called *outſucken multurs*.

Thirlages, are conſtitute by *write*, or by *preſcription*.

The wayes of conſtituting *thirlage* by *write*, are theſe;

Firſt, When a *Maſter thirles* his own *Tennents*, to his own *Mill*; in which caſe ordinarly he deminiſhes the rent of his *land*, in *contemplation* of what they are to pay to the *Mill*, for

for grinding their *Corns*, which he does by an *act* of his own *Court.*

Secundo, When an *Heritor* ſells his lands, to be holden of himſelf, and *thirles* his *Vaſſal* to his *Mill*; in which caſe he ſells ſo much the *cheaper*, and ſo the *multures* are juſt.

Tertio, When the *Heritor* of a *Mill*, *diſpons his Mill*, with the *multure* of his own Lands; in which caſe the *multures* are alſo juſt; becauſe he gets ſo much the more *for his mill*; and ſo this *ſervitude* is not ſo *odious* as it is believed to be.

Quarto, If a man *diſpones* the *mill of a Barrony*, *cum multuris*, or *cum aſtrictis multuris*; in either of theſe caſes, he thereby *aſtricts* his whole *Barrony*; though not *formerly aſtricted*; but if he *diſpone* the

Part 2. Tit. 9.

Mill of the *Barrony*, *cum multu-ris ſolitis & conſuetis*; he i thereby underſtood to have *thirled* onely what was *formerly thirled.*

If the *thirlage* bears *omnia grana creſcentia*, all the *Corn* growing upon the Land will be *thirled*, with *deduction* onely of *ſeed*, and *Horſe corn*, and the *ferme*; except it be carryed to another *Mill*, for it is preſumed *ferms* muſt be ſold.

Quinto, When *invecta & illata* are *thirled*, all *Corns* which thole *Fire* and *Water* within the *aſtriction*, muſt pay *multure* though they come not to the *Mill*; but being made in *Malt* are thereafter carryed abroad out of the *thirle.*

The way of conſtituting *thirlage* by *preſcription*, is *immemora-*

moral, or 40. years poſſeſſion, by vertue of ſome *title*; ſuch as a *Decreet*, though in abſence; and even when the *Maſter* is not called; and any Act of a *Barron court*, though made onely by a *Bailie*, without a ſpecial *warrand* from the *Heritor*; and though the coming to a *Mill*, *paſt all memorie*, does not aſtrict the *Comers* for the *future*; it being a general rule in *all ſervitudes*, that, *ea quæ ſunt meræ facultatis non preſcribuntur*; yet in *mills* of the *Kings property*, *immemorial poſſeſſion*, conſtitutes a *thirlage*; and if Men likewiſe pay *dry multures*, that is to ſay, ſuch a quantity, *whether they come to grind or not*, *for* 40. *years*; they will be thereby *aſtricted*; for it is not preſumable they would have payed *dry multure*, for ſo long

Part 2. Tit. 9.

a time except they had been *thirled.*

If the quantity to be payed, be not determined in *Write*, it is regulated by the uſe of payment for 40. years.

Thoſe who are *thirled*, are alſo obliged to maintain the *mill* in its *dammes*, *water-gangs*, and to bring home its *Mill-ſtones.*

If ſuch as are *thirled*, bring not their *Corns*, they are perſued by an *action* called, *abſtracted multures.*

There are two Rules to be obſerved in all *ſervitudes.*

Primo, *Res ſua nemina ſervit*, no man can have a *ſervitude* on what is his own; and therefore if the Land on which we have a *ſervitude* become ours, the *ſervitude* is *extinguiſhed.*

Secundo,

Secundo, When we have a *ſervitude* on any other land, this *ſervitude* affects every foot of that land, *unaquæque gleba ſervit*; but this is to be taken *civiliter, & non judaice*; ſo that it muſt be reaſonably uſed; And thus, if we *Feu* out ſome *Acres*, with priviledge to the *Feuer* to caſt *Faill* and *Divot* upon our Moor, for maintaining his houſes; though in ſtrict *Law*, every part of the Moor is affected with the *ſervitude*; yet the *Lords* will allow any man to Tile and Sow his own Moor, leaving ſuch a *proportion*, as may maintain theſe houſes. Part 2. Tit. 9.

Mixt Servitudes are partly *real*, and partly *perſonal*; and by the *Civil Law* are divided in *uſu fruct*, *uſe*, and *habitation*.

Part 2. Tit. 9.

Usus-fructus is called *liferent* in *Our Law*; which is a right to *use* and *dispose* upon any thing during *life*, the *substance* thereof being preserved.

Use and *habitation* were restricted to the *naked use* of the *Liferenter*; whereby his power of *disposing* and making *profit of* the thing *liferented* was restrained; and are not in use with us.

Liferents are either constitute by *paction*; or by Law; *liferents* by *paction*, are either by *reservation*; as when a *Fiar denuds himself* of the *Fie* in *favours* of another, *reserving* his own *liferent*; or by a new *constitution*; as when the *Fiar* dispons his lands to another, during all the dayes of his life; the first needs no *infeftment*; but the secohd does; else it is not

not *valid* againſt *ſingular Succeſſors*; but the *liferenter* being *infeft*, *tranſmits* his *right* to any by *aſſignation* without *infeftment*; for being a *ſervitude* and *perſonal right*, it neither *needs*, nor can *admit* of a *ſubaltern infeftment*. Part 2. Tit. 9.

A *Liferenter* alſo by *reſervation*, may enter the *heirs of Vaſſals* (though he cannot receive *ſingular Succeſſors*) if he was himſelf *infeft*; but another *liferenter* cannot; and even a *liferenter* by *reſervation* cannot enter thoſe *Vaſſals*, if he was not once *infeft*; becauſe he cannot *tranſmit* a *right* which he has not.

When moe perſons are joyntly *infeft*, they are called *conjunct* Fiars; but though a *wife* be a *conjunct Fiar*; yet her

Part. 2. Tit. 9.

her *Fie* laſtsbut *during her life*; and during her *life*, ſhe may enter *Vaſſals*, and has right alſo to all the *caſualities*, as other *Fiars*.

Liferents by *Law*, are the *Terce*, and the *courtiſie*.

The *Terce* is a *liferent* of the *third of all the tenements*, wherein the *husband* dyed *infeft*, provided be *law* to a *wife*, who is not excluded by *expreſs paction*; or is not provided to as much as will be *eqvivalent to the Terce* *; which Terce is conſtituted by an inqueſt, who upon a brief out the *Chancellary*, *directed* to the *Sherriff*, or other *judge ordinary*, doe ſerve her to a *Terce*; upon which *ſervice*, the *judge* to whom the *brief* was directed without *retouring* it, divids the land betwixt the *heir*; and *Relict*, and expreſſes

*K.C.2 Par. 3. Act 10.

preſſes the *marches* in an *inſtrument*, and this is called to *kenne* her to her *Terce*; the *marches* being *kenned* by the *inſtrument*; and though the *ſervice* gives her right to the *meals* and *duties*; yet ſhe cannot remove *tennents*, till ſhe be *kenned*, as ſaid is, the *kenning* being equivalent here to the *ſeaſin in lifrents*. Part 2. Tit. 6.

This *Brive* contains two points; firſt, that the *bearer*, was *Lawful Wife*, to the defunct and *ſecundo*; that he dyed *infeft* in ſuch *tenements*, but if the *Relict* was holden and reput *lawful Wife*, in her *Husbands life*; no exception in the contrary will ſtop the ſervice ‡. ‡K. J. 4. Par. 6. Act 77.

There is no *Terce* in *Burgage Lands*, *Feu duties*, or other *caſua-*

Part 2. Tit. 9.

caſualities, nor in *reverſions*, *tacks*, nor *Patronages*.

The *Courtiſie*, is a *liferent*, granted by *Law*, to him who *married* an *Heritrix*, of all her *Heritage*, and of that only; It needs neither *ſeaſin*, nor other *ſolemnity* to its *conſtitution*; but is *ipſo jure*, continued to him; if there were Children *procreated* of the *Marriage*, who were heard *to cry*; though the *Marriage diſolve within year and day.*

All theſe *Liferenters* are obliged to find *caution* to preſerve the thing *liferented*, and to leave it in as *good condition* as they found it, which is called *cautio uſu-fructuaria*; and they are alſo bound to *Aliment* the *appearand Heir* if he have not *Aliundi*, to *Aliement* himſelf *. It

*K. J. 4 par. 3. Act 25.

If *Liferenters* ſurvive *Martinmeſs*; or if they die upon *Martinmeſs day*, in the *afternoon*; their *Executors* will have right to the whole *years rent*, whether it be *Land rent*, or the *rent of a mill*; albeit the *Conventional termes* were after *Martinmeſs*; But if *Liferenters* labour the Lands themſelves, their *Executors* will have right to the *whole rent* thereof, albeit they die before *Martinmeſs*.

Title X.

Of TEYNDS.

TEynds*, being a burden *affecting Lands*, fall in to be conſidered in this place.

* Tyths or Tenths.

Teynds are deſigned to be that

Part 2. Tit. 10.

that *ſpecial* and *liquid proportion*, or *quota* of our Goods, and Rents lawfully acquired that is due to GOD, for maintaining *His Service.*

It ſeems *Our Law* has followed the opinion of thoſe *Divines*, who think, that ſome *proportion* of our Goods is due by *Divine right*; for we ſay, that *Teynds are the Spirituality of the Churches revenue*; But that the proportion is not *Juris Divini*; for we alter the proportion by ſpecial *laws* and *cuſtoms*; though for diſtinctions ſake we call this *proportion* the *Tenth.*

By the *Canon Law*, they are divided into *perſonal teynds*, which ariſe out of the *perſonal gaine* and *profites*, that a Man has by his *Trade*; *Predial teynds* which aryſe from the Natural Product of the Land that

that men poſſeſs. And *mixt Teynds* which ariſe from the profites, that men by their *Perſonal induſtrie* make out of their Lands. Part 2. Tit: 10

They are likewiſe divided into *Parſonage teynds*, which are due to the *Parſon*; and *Viccarage teynds*, which are due to the *Viccars*; And regularly all *teynds* are due to the *Incumbent*, who ſerves the *Cure*; ſo that if the *Incumbent* be a *Parſon*, he has a right to the *Parſonage teynds*; and if he be a *Viccar*, he has right to the *Viccarage teynds*.

The *teynds of Corn*, are called *Parſonage teynds*, or *decimæ garbales*; and the *fifth boll* of the *free rent* is ſtill *teynd* with us; And all Land muſt pay *teynd*; except they be ſuch as have been *Feued* out of old by *Church*

Part 2. Tit. 10.

Church men, before the *Lateran Council*, by which they were prohibited to *alienat* the *teynds*, and who had right both to *ſtock* and *teynd*; and where the *teynds* were never known to have been ſeparated from the *ſtock*.

Some *Monks* likewiſe got particular *exemptions* from paying *teynds*, for theſe Lands which they themſelves did bring *in*, and *cultivate*; and with us the priviledges granted to *Temple lands*, which belonged of old to the *Knights of St. John, a Religious Order*; and to the *Monks* of the *Ciſterian Order*, are continued to thoſe who have right to their Lands, with that *Exemption: Manſes*, and *Gleibs*, are likewiſe free from payment of *teynds*.

Viccarage teynds, are called the

the *ſmall teynds* with us; becauſe they are payable out of inconſiderable things, ſuch as *Lambs*, *Wool*, *Cheeſe*, *Eggs*, *&c.* and they are ſaid to be *local*; becauſe they are payed according to the cuſtome of the place; ſo that in the ſame *Pariſhes*, ſome *Heritors*, will be lyable for *Viccarage teynds* of different kinds; for though no man can preſcrive a *liberty* from payment of *Parſonage teynds*, ſince the *Lateran Council*; yet, as 40. *years poſſeſſion* is a ſufficient right to a *Miniſter*, for *Viccarage teynds*; and as it does determine the *Quota*, as well as the *ſpecies of Viccarage teynds*; ſo by 40. *years Freedom*, the *Heritour* is ſecure in all time coming, from payment of *Viccarage teynds*. Part 2. Tit 10.

When *Popery* was ſuppreſt, all

Part 2. Tit. 10.

all the Lands belonging to *Monks*, and others, were *annexed* to the *Crown*, in *anno* 1587*but the *teynds* belonging to them were not *annexed*; theſe being acknowledged by *Our Law*, to be the *Patrimony of the Church*; and they are therefore called, the *Spirituality of the Benefices.*

*K. J. 6. Par. 11. Act 29.

The *Monaſtries of old*, having gotten ſeveral *pariſh Churches* mortified to them; whereby they had right to their *Parſonages teynds*; ſuch as got thoſe *Monaſtries diſponed* to them, *erected* in their Favours, became thereby to have right to other *mens teynds*; and great *emulation* as well as *prejudice* ariſing from mens not having right to lead their *own teynds.*

King

King Charles the first, did therefore prevaile with all the the ſaids *Titulars of erection*, to ſubmit what ſhould be payed them, as the price of the ſaids *teynds*; and *His Majeſtie* did determine, *that the rate of all teynds, ſhould be the fifth part of the conſtant rent*; where the Stock and Teynd were *accuſtomed* to be ſet joyntly; but the fourth part onely where the teynds were uſually ſet ſeparate from the Stock; A fifth part being Deduced by the King in that caſe; becauſe ordinarly *Churchmen* uſed to draw too great a proportion; and this *deduction* is therefore called the *Kings eaſe*; as alſo, that the ſaids *teynds* being *valued*, ſhould be bought at nine years *purchaſe* *. Part 2. Tit. 10.

*K.C.1 Par. 1. Act 17. and 19. K.Ch. 2 Par. 1. Seſſ. 1. Act 61.

For Effectuating this *determination*,

Part 2. Tit. 10.

nation, the *Parliament* 1633. appointed ſome of their own number, to *value* the ſaids *teynds*, and after a *proceſs for valuation* is raiſed, before theſe Commiſſioners, in which the Titular his *Tacksman*, and the *Miniſter*; are to be cited, the *Heritor* in the mean time gets the leading of his own *teynds*.

The *probation* is oftimes allowed to both *parties* in this *court*; and where one *party* is preferred, it is called; the *prerogative of probation*; and is much contended for; and is thus regulated, *viz.* either the *teynds* are drawn *ipſa corpora*, by the *Titular*, or *Tacksman*; and then they have the *ſole probation* allowed them, to prove what the *teynds* were worth. (They proving that they led *ſeven years* of 15. before

fore 1628;) or elſe they have *Rental bolls* payed them; *& eo caſu*, they have the *ſole probation* likewayes, they proving 20. *years poſſeſſion* of uplifting *Rental bolls*, condeſcending upon *quantitie* and *qualitie*; or *Tertio*, the *Heritors* have Tacks of their own *teynds*, for payment *of Silver dutie*; and then there is *joynt prabation* allowed both to *Heritor*, and *Titular*. Part 2. Tit. 10.

Eccleſiaſtick Perſons, ſuch as *Biſhops*, *Parſons*, *&c.* Submitted only what they were not in *poſſeſſion of*; and therefore, there can be no *valuation* led of any *teynds*, *Parſonage*, or *Viccarage* which they were *actually in poſſeſſion* of; but by a *Letter* from His *Majeſtie* thereafter in *anno* 1634; It is declared, that; *if there teynds*

Part 2. Tit. 10.

teynds be ſet to Tacksman, they may be valued during the tack; whereas the teynds they were in poſſeſſion of cannot; though teynds holden of Collegiat Kirks may be valued; and ſo may be bought and ſold.

The *Burrows* are onely *decerned* to ſell the *Superplus*, of the *teynds* they had right to, over and above what was due for the intertainment of their *Miniſters*, *Colledges*, *Schools*, and *Hoſpitals*.

After the *teynds* are valued, and the *Titular decerned* to ſell; or if the *Titular* be willing to ſell without a *decreet*; The *Heritor* is *infeft*; and *ſeaſed* by the *Titular*, who in the *diſpoſition*, or *Charter* reſerves to himſelf relief of the *Kings annuitie*, and of all *impoſitions* laid

laid or to be laid upon *teynds*; and *warrands* only from his own, and his *Predeceſſors facts* and *deeds*; and on the other hand the *Heritor* who has got *a Decreet of valuation* and not *of vendition*; is obliged to *infeft* the *Titular*; for *ſecuritie* of the *valued bolls*.

By the foreſaid *Decreet Arbitral*, the ſeveral *Pariſh Kirks* were to be provided; and therefore the *Titular* might *Allocat* any one *Heritors teynds*, for proviſion of the *Miniſter*; and ſo he was excluded *from* the *priviledge of buying*, whereas, it had been much better, that the *Stipend* had been proportionably laid upon all the *Heritors*.

Teynds are not *debita fundi*; and ſo *ſingular Succeſſors* are

Part 2. Tit. 10.

not lyable in them; but yet the *Miniſter* has ſo far a *tacit hypothique*, that he may exact his *modified ſtipend* from any of the *Heritors*; as far as his *teynds* will extend, reſerving *relief* to that *diſtreſſed Heritor*; and if the *Heritor* ſell his *Crop*, the *Merchant*, who *buyes* the ſame will be *lyable*; but *tenents* will not be *lyable*, if they pay a *joynt dutie payable* to their *Maſter for Stock and Teynd.*

When the *tack of teynds* expire; the *Titular* needs not uſe a *warning* againſt the *tacksman* as in *lands*; but he raiſes and executes an *Inhibition* againſt the *Tacksman*, which interrupts *tacit relocation*, for that and all the *Subſequent years*, after which the *intromettors*, are lyable to a *Spuilie*.

The

Part 2. Tit. 10.

The *Parliament* 1633. did after the ſaid *ſubmiſſions* and *Decreet arbitral*, grant to His *Majeſtie* an *Annuitie* out of all *teynds*; except thoſe payed to *Biſhops*, and other *pious uſes*; *viz. ten ſhilling out of every boll of teynd-Wheat*; out of the *boll* of the beſt *teynd-Bear*, *eight ſhilling*; *out of Oats*, *Peas*, and *Rye*, *ſix ſhilling*, where the *boll of* theſe *grains* did yield a *Boll of Meal*; and where the Rent conſiſts *of money*, *ſix merks out of* every *hundered*; and this *Annuity* is *debitum fundi*; but not being *annext to the Crown*, it may be, and is ordinarly bought by the *Heritors*, from His *Majeſties Theaſurer*, or others having *right from the King*.

Title XI.

Of INHIBITIONS.

PRoperty, and *Real Rights*, with the burdens affecting the ſame, being *explained:* It is fit now to treate of *Legal Diligences*, by which theſe *rights* may be *evicted*, or the free *uſe* and *diſpoſal* thereof *Reſtrained*; which *diligences* are chiefly three, *Inhibition*, *Compryſing*, and *Adjudication.*

Inhibition, is a *perſonal prohibition*, by letters under the *Signet*, Diſcharging the *partie Inhibit* to ſell, *Dilapidate*, or put away any of his *Lands*, in prejudice of the *debt* due to the *Raiſer* of the *Inhibition*; the ground and Warrand thereof

is

is an *Obligation*, or Bond for doing and performing any thing; or a *depending Proceſs*; And if theſe *Inhibitions* be not raiſed upon *Legal* and *Relevant* grounds, they may be reduced. Part 2. Tit. 11.

Inhibitions reach onely *Heritage*, but not *moveables*; though the ſtile thereof runes equally againſt both; but *moveable bands* may be reduced, in ſo far as they may be the Foundation of *real diligences* to affect *Heritage*; and they extend only to poſterior voluntary Rights granted after *Inhibition*; but not to *Appryſings*, or *Adjudications*, though led poſterior to the *Inhibition*, if the ground thereof was *anterior*; neither do they extend to *poſterior diſpoſitions*, and *Infeftments* depending upon *prior obligements*;

Part 2. Tit. 11.

either general or particular, for granting of theſe Rights; nor to *Renounciations of temporary Rights*; albeit *poſterior* to the *Inhibition*, theſe being neceſſar upon *payment.*

But by a late Act of *Sederunt* *, *If the Creditor intimat by way of Inſtrument, to the perſon having the right of Reverſion, that the Wadſetter, or Annualrenter, ſtands inhibit at his inſtance; and does produce in preſence of the Parties, and Notar, the Inhibition duly Regiſtrated*; The Lords *will not ſuſtaine Renounciations, or Grants of Redemption; although upon true payment; unleſs there be a Declarator of Redemption obtained, to which the Inhibiter muſt be cited.*

* Act of Sed. 19. Feb. 16. 1680.

The way of *executing Inhibitions* is, that the ſame muſt be by a *Meſſenger* againſt the perſon

perſon *Inhibit*, perſonally, or at his *dwelling place*, and at the *mercat croſs of the head Burgh of the ſhire*, *Stwartry*, or *Regalitys* where the *perſon inhibit* dwells *, and after *crying of three ſeveral oyeſes*, and publick reading of the *Letters*, the whole *Leiges are diſcharged* to purchaſe any Lands or Heritages, from the *perſon inhibit*; and the *Meſſenger* leaves or affixes a *coppy of the letters at the mercat croſs*; all which moſt be *written in a paper*, and *ſubſcrived by the Meſſenger* and by two *witneſſes* *; which *write*, *is called the execution of Inhibition*; and there after the *letters and executions thereof muſt be Regiſtrated* within 40 dayes, after the *execution* thereof; either in the *general Regiſter at Edinburgh*, or in the *particular Regiſter of the Juriſdiction*

Part 2. Tit. 11.

*K.J.6. Par 15. Act 264 & 265. par. 16. Act 13.

*K.C.2 Par. 3. Act 26.

Part 2. Tit. 12.

diction, where the *perſon inhibit* dwells; or the *major part of the Lands lye* * ; and if any of theſe *Acts* be *omitted* the *Inhibition* is *null*, theſe being *de ſolenitatibus inſtrumenti.*

*K.J.6. Par. 7. Act 119

Title XII.

Of Compriſings and Adjudications.

THE *Fie* being thus ſettled in the *Vaſſal* it may be either taken from him, and *evicted for his debt*, or his *crimes*; the firſt, is, by *appryſing*, and *adjudication*, and the laſt, by *confiſcation* and *forefaulture.*

Appriſing proceeds by *letters* charging the *Debitor* to compear before a *Meſſenger*, (who is

is by the *Letters* made *Judge*; and *Sherriff* in that part in place of the *Sherriff of the ſhire*, whoſe office properly it is *) and to hear the *Lands ſpecified* in the *letters*, *appriſed* by an *inqueſt* of 15. *ſworn Men*, and declared to belong to the *Creditor for payment of his debt*; but becauſe *Our Law* thought it not juſt that a *mans Land* ſhould be taken from him whilſt his *moveables* could pay his *debt*; therefore, in the firſt place, the *Meſſenger* who executes the *Letters* muſt declare, that he *ſearched for moveables*; and becauſe he could not find as many as *would pay the debt*; therefore he *denounced* the *lands* to be *appriſed* on the *ground of the Lands*, and at the *mercat croſs* of the *Shire*, *Stewartry*, or *Regality* where the *Lands lye*,

Part 2. Tit. 12

*K. J. 6. Par. 5. Act 37.

Part 2. Tit. 12.

and left *coppies both on the ground*, and at the *Croſs*.

At the day appointed by the *Letters*, the *Meſſenger* who is made *Sherriff* in that part, *Fences a Court*, and the *Debitor* being called, his lands is offered to him for the *money*; and if the *money* be not ready: the *Inqueſt* finds that the *Debiors lands* ſhould belong to the *Creditor for his payment*, and this is called *a Decreet of Compriſing*; and the moſt part of the *inqueſt affixes* their *ſeals thereto*; upon which the *Compryſer* gets a *Charter* paſt in *Exchequer*, and is *infeft by precepts out of the Chancellary*; if the Lands hold of the *King*; and though of old, *land appryſed*, was proportioned to the *money*; yet *thereafter* whatever *land* was ſought to be *appryſed* was ac-

accordingly *appryſed*; though *farr exceeding* the *ſum* in *value*, becauſe *ſeven years* was given (which was thereafter *prorogate* to *ten* *) for *Redeeming the Land by payment of the true ſum*, and this is called a *legal reverſion*; becauſe the *Law* gives it to the *Debitor*; and if it be not *redeemed* within that time, the *land* belongs to *himſelf for ever*; but that *legal* runs not againſt *minors*; becauſe they want *Judgement* to know their *hazard*; ſo that they may *redeem* at any time before they be 25. *years compleat*; but if the *Compryſing expyre* during their *minority*; the *Compryſer* will thereafter have *right* to the whole *mails* and *duties*, albeit exceeding his *annualrent*; But that part of the *Act* is altered by a *poſterior ſtatute*, and the

Part. 2. Tit. 12

*K.C. 2. Par. 1. Seſſ. 1. Act 62

ap-

Part 2. Tit. 12.

appryſer is *reſtricted* to his *annualrent* during the *minority of the Debitor* *.

*K.C.2 par. 1. Seſſ. 3. Act 19. If a *minor* ſucceed to a *minor*, whoſe *lands* are *appryſed*, he has right to redeem, as if the *Compryſing* had been led againſt himſelf; But if a *Major* ſucceed to a *Minor*, after the *Legall* is expired, he hath onely *year* and *day* to *redeem*; and if the ſeven years be unexpired in the *Minors* time, the *Major* may *redeem* within theſe years that are not run: And if the Rent of the Lands be not correſpondent to the *annualrent of the Money*; whoever has Right to the *Reverſion*, whether *Major* or *Minor*, muſt ſatisfie the whole *ſums* and *annualrents* reſting before he can * redeem;

*K.J.6. Par. 23. Act 6. But the *Compriſer* during the *Legal* is reſtricted to the *annual-*

rent

rent of the ſums due to him; and the *ſuperplus of his Intromiſſion* will be imputed in payment of his *principal ſum*; and if he be payed by *Intromiſſion*, within the *Legal* of his whole *principal ſum*, bygone *annualrents*, and *expenſes*, with the *compoſition* payed to the *ſuperior*, the *compriſing* expires, *ipſo facto* *. Part 2. Tit. 12. *K. J. 6 par. 21. Act 6.

Though the *ſupiriour* be not regularly obliged to receive a *ſingular ſucceſſour*; yet leaſt by *colluſion* betwixt the *debitor* and his *ſuperiour*, the true *creditor* ſhould be unpayed; Therefore by a ſpecial *Act of Parliament*, the *ſuperiour* is forced to receive a *Compryſer* upon payment of a full years Duty of the Land *, and he gets no more from all; though many *Compriſers* charge him to receive them; but if the *ſupe-* *K. J. 3. Par. 5. Act 37. K. J. 6. Par. 23. Act 6.

Part 2. Tit 12.

ſuperiour pleaſes he may retain the Land to himſelf, he paying the Debt.

The firſt *Compriſing*, without *ſeaſin*, carryes right to all *Tacks*, *Reverſions*, and other Rights, which require no *Infeftment*; and all *poſterior Compriſings* need not *ſeaſin*; becauſe they carry onely the Right of *Reverſion*; but yet ordinarly *ſecond Appriſers* do *infeft* themſelves, becauſe the firſt may be *null*, or become payed; or the firſt *Compriſer* may lye out from ſeeking *Meals* and *Duties*; or the ſecond *Compriſer* would remove Tennents, which none can purſue without being *Infeft*, but the *Superiour compriſing* needs no *Infeftment*.

After *denounciation* of the Lands to be *appriſed*, the *Debitor* can do no voluntar deed by

by Diſponing, or Reſigning; (becauſe elſe he might fruſtrate the *diligence*) except he was before *denounciation* ſpecially obligedto *diſpone* or *reſigne*.

In a competition amongſt *Appriſers*, the firſt *Infeftment*, or charge againſt the *Superiour* is alwayes preferred; and if the firſt *Compriſer* did diligence to be *infeft*, but was ſtopt by *colluſion*, as if the *Superiour* to gratifie the ſecond *Compriſer*, ſhould unjuſtly ſuſpend the firſt; albeit the ſecond *Appriſer* be firſt *infeft*, yet the firſt *appriſer* having done *diligence* by charging, the *Superiour* will be preferred to the ſecond *appriſer* firſt *infeft*.

The *Compriſer* during the *years of the legal* is not obliged to enter to the *poſſeſſion*, but if he once enter he muſt be com-

Part 2. Tit. 12.

comptable for the *Meals* and *duties* though he leave off to *poſſeſs*; but if the meaneſt *part of the ſum* be unpayed after the expyring of the *Legal*, the whole *land compriſed* belongs to the *Compriſer* without conſideration of what he has *intrometted* with; to prevent which the *Debitor*, or a *Second*, or any *poſteriour Compriſer*, who has *compriſed* the right of *Reverſion*, does before the *Legal* expire, require the *Compriſer* to compear at any *day*, or *place*, to receive his *Money*, in ſo far as he is not payed by his *Intromiſſion*; and having *conſigned* the ſame accordingly at that *day*, he raiſes an *Action of Compt* and *Reckoning* before the *Lords of Seſſion*; and if it be found that he is payed by *Intromiſſion*, and the Money *conſigned*

Part 2. Tit: 12.

ſigned, The Lords decern the compriſing to be payed, and extinct; nor needs the *Debitor* get *new ſeaſin*; for the former Right revives; ſince the *Fie* was ſtill in his Perſon, upon condition, that he would *pay the ſum* within the *Legal.*

In this *Compt* and *Reckoning*, the *compryſer* will get allowance of the *ſherriff* Fie; which is the *twenty penny* of the *ſum* that was *compryſed* for, and of the entrie payable to the *ſuperiour*, though the *appryſer* truely payed neither; but he will not get payment of a *Chamberlane Fie* for taking up the rent; except he really payed it.

All *appriſings* led ſince the firſt of *January*, 1652. within *year* and *day* of the firſt *effectual compriſing* by *infeftment*, or charge againſt

* K.C. 2 Par. 1. Act 62.

againſt the *Superiour*, come in *pari paſu*, as if they were all contained in one *appriſing*. But the *poſterior appriſings* within *year* and *day*; muſt pay their proportion of the Expenſes of the *Infeftment*, and *compoſition* given to the *Superiour* by the firſt *appriſer*;

Becauſe *appearand Heirs* did frequently acquire Rights to expired *appriſings* againſt their *Predeceſſours*, by which they *bruicked their Eſtate*, without paying his Debt, to the ruine of *lawful Creditors*; Therefore, *Our Law* did very juſtly ordain, all ſuch *Appriſings* to be *redeemed* for the *ſums truely payed* out by the *appearand Heir*; which proceeds, albeit the *appearand Heir* acquire theſe Rights in his *Predeceſſours lifetime*. But if the expired

appriſ-

appriſing was acquired *gratis*, by the *appearand Heir*, the ſame is onely redeemable by the *Creditors*, for the ſums contained in the *appriſing**. Part 2. Tit. 12.

* Act foreſaid.

Becauſe the *Parliament* thought it *exhorbitant* to take the greateſt *Eſtates* for the *ſmaleſt ſums*, and to make a *Meſſenger Judge* in affairs of ſo great *importance.*

Therefore in *anno* 1672. this way of *compriſing* was altered, and in place thereof the *Creditor* now gets land adjudged to him by the *Lords of the Seſſion*, proportionally to the *ſums* due to him for obtaining infeftment, with a fifth part more; becauſe the *Creditor* is obliged to take land *for his money*; which *Adjudication* coming in place of *Compriſings* is perfected by *Charter* and *Seaſin*,

Part 2. Tit. 12. *ſin*, as *Compriſings*; and the *Superiour* is obliged to receive the *Adjudger**; but it is redeemable onely within *five years* by *Majors*.

*K.C.2 Par. 2. Seſſ. 1. Act 18.

If the *Debitor* compear not to concur for compleating the *Adjudgers right*, by giving him a *progreſs*, & *tranſumpts of the evidents*, and ratifying the *Decreet of Adjudication*; then the whole lands may be *adjudged*, as they were formerly *appriſed*; it being unreaſonable to *force* a Man to take *proportional land* for his *money*, and yet to be unſecured even for that *proportion*; and they are *redeemable* within *ten years*; (theſe *Adjudications* being now come in the place of *Appriſings*), and have the ſame *priviledges* and *reſtrictions* which *compriſings* had by the *Act of Parliament*, made con-

concerning *Debitor* and *Creditor*, in * *Anno* 1661. But if the *Creditor* attain poſſeſſion upon his *compriſing*, or *Adjudication*; he can uſe no further *execution* againſt the *Debitor*, except the Lands be *evicted*.

Part 2. Tit. 12.

* K.C. 2 Par. 2. Seſſ. 3. Act 19.

There are other two kinds of *Adjudications*, allowed by *Our Law*; the firſt is, when the *appearand Heir of the Debitor is charged to enter Heir*; and renounces to be *Heir*; the *Creditor* having obtained a Decreet, *cognitionis cauſa*, for conſtituting the *Debt*, wherein the *appearand Heir* is onely purſued for *Formality*; But the Decreet can have no effect *Perſonally* againſt him; The *Hereditas jacens* will be *adjudged* to the *Creditor*, for payment of the Debt due by the *Defunct*; which if it be *liquid*, and in-

Part 2. Tit. 12.

inſtantly inſtructed; the *Purſuer* in the ſame Proceſs proteſting for *Adjudication*, the ſame will be allowed to him, ſummarly without neceſſity of any other Decreet, *cognitionis cauſa.*

Theſe *Adjudications* are redeemable within *ſeven years*, at the inſtance of *Con-Creditors*, one after another, who have likewiſe obtained Decreets of *Adjudication*; And a *Minor* renouncing to be *Heir*, may be *reponed*, and allowed to *redeem upon payment* *.

*K.C.2 Par. 1 Seſſ. 1. Act 62.

And if the *Superiour* be charged to *infeft* the *Adjudger*, he will get a *years rent for compoſition*, as in *Compriſing**.

*K.C.2 Par. 2 Seſſ. 1. Act. 18.

Adjudications, carry right to all which would have *fallen to the Heir*; as all *Heritable Rights*, and the whole bygone *rents*

rents and duties, ſince the *defuncts* death may be *adjudged*; becauſe theſe belonged to the *Heir*.

There is another kind of *Adjudication* competent by *Our Law*; that is for performing any *obligement* which conſiſts *in facto*, and relates to particular *diſpoſitions*; or *obligements* to *infeft* and after *diligence* uſed by *Decreet*, and *Regiſtrated horning* againſt the *diſponer*, and his *Heir*, for making the ſame effectual: the *Lords* will *adjudge* the *Lands diſponed to the purſuer* as a *remedium extraordinarum* there being no other remedy competent.

This *Adjudication* extends no farther than to the thing *diſponed*; and hath no *reverſion*; nor does it require charges to *enter Heir*, or *renounciation*; but the

Par: 2. Tit. 13.

the Authours right muſt be inſtructed.

Confiſcation will be handled in the *Title of Cryms*, and *Criminal Proceſſes.*

IN-

The INSTITUTIONS of the LAWS of SCOTLAND.

Part Third.

Title I.

Of Obligations, and Contracts in general.

HAving thus cleared *Real Rights*; We will now proceed to treate of *Obligations*, and *Perſonal Rights*.

An *Obligation*, *is defined to be that Legal tye; whereby we are bound to Pay, or Perform any thing.* Obligations.

Part 3. Tit. 1.

The chief *diviſion* of *Obligations* by the *Civil Law*, and *Ours*, is, that ſome are *Natural*; becauſe they ariſe from the principles of *right Reaſon*, or *Laws of Nature*. Some *Civil*, becauſe they ariſe from *poſitive Laws*, or *Municipal Cuſtoms*.

Another conſiderable *diviſion* of *Obligations* is, that ſome ariſe from *Contracts*; ſome from *deeds*, reſembling *Contracts*; ſome from *malefices*, and ſome from *deeds* which reſemble *malefices*, *Ex contractu, aut quaſi contractu*; *ex maleficio, aut quaſi maleficio*; for we become equally tyed and obliged to *Men*; either by *contracting expreſly* with them; or by doing ſome *deed* which induces an *obligation* without an *expreſſe paction*; or by committing *male-*

fices

fices againſt them.

Part 3. Tit. 1.

A **Contract* is an *agreement entered into by ſeveral perſons, inducing an obligation by its own Nature; * and the obligations aryſing from Contracts*, are divided and diſtinguiſhed, according as they are perfected, either by the *ſole conſent* of the *Contracters*; or by the *intervention* or *tradition* of things; or laſtly, by *Word* or *Write*; hence is that remarkable *diviſion of Contracts* in the *Civil Law*, *Qui re, verbis, literis, aut conſenſu perficiuntur.*

*Contracts.

The *Contracts* which depend upon things, are theſe which ariſe either from *borrowing*; (which comprehends *indebite ſolutum*,) or from *loan*; or from *depoſitation*; or from *impignoration*; and are called *mutuum commodatum, depoſitum & pignus.*

Part 3. Tit. 1.

* *Borrowing*, or *mutuum*, is that *contract*, *whereby a Man getting any thing from another, is obliged to reſtore him not the ſame thing that was borrowed, but the equivalent; or as much of the ſame quality in meaſure, number, or weight*; as when one borrowes a *thouſand pounds*, the *Receiver* obliges himſelf to reſtore, not the ſame; but another *thouſand pounds*; and therefore the *propertie of the thing borrowed*, being transferred from the *Giver* to the *Receiver*; the *Receiver* runs the hazard of all the loſſe that the thing Borrowed can ſuſtain, after it is delivered: This *contract* is moſt ſtrictly interpreted, ſo that nothing is underſtood but what is clearly expreſt.

* Mutuum.

* Commodatum.

* *Loan*, or *Commodatum*, is that

that *Contract* whereby a man *gets the Loan of any particular thing Gratis, for ſome ſpecial uſe, and obliges him to reſtore the ſame thing in ſpecie; and not the equivalent*; as when a man gets the *Loan* of a *Horſe*, or *Coach*; and becauſe in this caſe, the *propertie* remains with the *lender*, therefore if the thing lent be loſt, or *periſh* by *chance*, the loſſe redounds to the *lender*; for the thing is ſtill his; but if the thing be *lent* meerly for the *advantage* of the *borrower*, he is lyable to do moſt exact diligence; and therefore, if the thing *periſh*, or *ſuſtain* any *prejudice* for want of exact diligence the *borrower* muſt make up the ſame; but if the thing was *lent* for both the *borrower* and the *lenders advantage*, then

Part 3. Tit. 1.

Part 3. Tit. 1.

from the ſame principal *of natural equity*, the *borrower* is only obliged to do ſuch diligence, and to be ſo carefull of the thing *borrowed* as he would have been of *his own*.

In this *Contract*, the *receiver* is obliged to reſtore the ſame *ſpecies* in as *good condition* as he *got* it; and the *Lender* is obliged to pay the *Receiver* any conſiderable expenſe, that he neceſſarly beſtowed upon the *thing borrowed*, the *Law* not allowing *inconſiderable expenſes*; becauſe, the *Borrower* has the uſe of the thing, which ſhould compenſe theſe.

Precarium.

Precarium, is, *when any thing is lent to be called back at the Lenders pleaſures, wherein it differs from Commodatum*; which *imports* alwayes a *determinate time* for making uſe of the thing *lent*

De-

**Depoſitation*, is that *Contract* which is entered into by one mans *delivering any thing, into the cuſtodie of another to be kept gratis for his uſe*; and therefore, becauſe in this *Contract*, the *propertie remains* with him, who did *depoſitate the thing*, if it be loſt, it is loſt to him; and ſince *depoſitations* are made for the *behoove of him* who does *depoſitate*; Therefore, the *Depoſitar* (for ſo we call him, in whoſe hand the thing is *Depoſitated*) is only lyable if the *thing Depoſitate*, was *loſt* by the *depoſitars* dole, or *groſs fault*; *nam depoſitarius tantum preſtat dolum, & latam culpam*; yet *Inns-keepers*, *Stablers*, and *Maſters of Ships*, are lyable to moſt exact diligence, in *preſerving* the *goods of Travellers* and *Paſſengers*, which they

Part 3. Tit. 11

* Depoſitation.

Part 3. Tit. 1.

bring into their Houſes, and Ships, and to repair and make up all the loſs they may ſuſtain, while they are in the *Inns*, or *Ships*, whether the prejudice come by the *Servants*, or *Mariners*, or by *Strangers*, which ſpecial kind of *depoſitation*, is *introduced by equity*, *contrare* to the *Common Rules* of *Depoſitation*, and which we have *immediately* from the *Civil Law*, and *edictum prætoris*, Intituled, *Nautæ caupones Stabularii*, &c.

As in this *Contract*, the *Depoſitar* is lyable to reſtore the ſame thing that is *Depoſitate*, and not the *equivalent*; ſo the *Depoſitor* is *obliged* to pay the *Depoſitar* what he beſtowed upon it, whilſt it did lye beſide him, for generally a *Gratuitous Office*, ought to *prejudge* no man.

But

Part 3. Tit. 1.

But he cannot crave *Compenſation* upon any *debt* due to him by the *Depoſitar*, which is *ſingular in this Contract.*

Pledge.

Pledge, is the *Contract*, whereby *one man gives to another any thing, for the Receivers Security for what he owes him, to be redelivered* upon *payment*; and therefore, becauſe the *thing it ſelf in ſpecie*, is to be *redelivered*; if it *periſh during the Impignoration*, by the *groſs fault* or *fraud* of him who receives the *pledge*, it *periſhes* to the *Impignorator*; and becauſe *Impignorations* are made *for the advantage* both of the *giver* and *receiver*, (the one being concerned to *get money*, or ſome ſuch *thing* upon the *pledge*, and the other to *get a pledge for ſecurity of his money*;) therefore he who receives the

Part 3. Tit. 1.

pledge, is lyable to do ſuch *diligence* for *preſerving* thereof as *prudent men* uſe to do in their own *Affairs*; but he is not *lyable* for *culpa leviſſima*; the *Contract* being for the behoove of both parties; and he will have *repetition from him*; for what he *profitably beſtowed* upon it *during* the *Impignoration*.

Sometimes what is *Impignorated* is not delivered, and then the *Pledge* is called an *Hypotheque*, and the *Law* ſometimes makes ſuch *tacit hypotheques* without *expreſs paction*, as where it makes the *Corn growing* upon *land*, or the *goods brought* in to the Houſe, that was ſet in *Tack*, to be lyable to the *Heritor for payment of his rent*.

If one man payes to another more than is *due to him*; or what

what is not *due at all*, the *Law* allowes to him *Repetition* of what was *unjuſtly payed*; and this is called (*condictio indebiti*;) becauſe by *paying* to you, I *oblige* you *really* and *in effect*, to repay what ſhall be found not to be *due*; or to have been *payed* more than was *really due*; but ſince this *obligation* ariſes from the *payers ignorance*, therefore if he knew that what he *payed* was not *due*, he will not get *Repetition*; but what he payed will be lookt upon, as a *donation*, but it muſt be *ignorantia facti*, for *ignorantia juris* availeth no man; and ſince this *repayment* is only allowed by the *principles of natural equity*; therefore if what was payed was *due in equity*, though it was not *due by poſitive Law*, the

Part 3. Tit. 1.

Condictio Indebiti.

Part 3. Tit: 2.

the payer will not *get Repetition.*

Title II.

Of Obligations by Write, or Word.

Obligation by Write.

SOme *Obligations*, require *Write*, to make them *binding*; whereas others require *Write* only by way of *Probation*, that is to say, *cannot be proven without write, though they be valid, and binding without it.*

All *Obligations* for *transmitting the reall right of lands*, do so far require *Write* of their own *nature*; that though the *bargan* be *solemnly* and *clearly* ended, by *verbal transaction*; yet

yet there is ſtill place to *reſile*, or *locus penetentiæ*, till the *write be ſigned*. Par: 3. Tit. 2.

Though *verbal promiſes* doe by *Our Law*, bind the *promiſer*; yet becauſe the *poſition* and *import* of words may be eaſily miſtaken by the *hearers*; therefore *verbal Obligations* or *promiſes* can only be proven by *Oath of partie*, and not by *witneſſes*, though the *ſum* be never ſo *ſmal*. Promiſes.

Becauſe, *Mens ſubſcriptions* may be eaſily *counterfitted*; therefore by an *expreſs Statute* with *Us*, no *Obligation* though in *write* for more than 100 *lib.* is *valid*; except it be ſigned *in preſence of two ſubſcriving witneſſes*, if the *partie* can *write*; or by two *Notars*, and four *witneſſes*; if the *partie* cannot *write* *; except the *write* be *K.J.6. Par. 15. Act 175

Part 3. Tit. 2.

be *holograph* ; and that the *writter* and *witneſſes* be *ſpecially deſigned* * ; and though the *ſubſcriving* by two *initial letters* be ſuſtained, where it is proved that the *ſubſcriver* was in uſe ſo to *ſubſcrive* ; yet the *Granters* mark is not ſufficient, except the verity of the affixing that mark be *referred* to the *granters Oath.*

*K.C.2 pat. 3. Act 5.

Bills of Exchange.

Such is the *favour of commerce*, and ſuch *expedition* it requires, that upon its *account* , *bills of Exchange* are ſuſtained; though they be not ſigned before *witneſſes* ; and *delivery of goods*, upon *bargans* are ſuſtained to be prov'd by *witneſſes* ; though there be no *write* ; and ſuch is the *favour of contracts of Marriage* ; eſpecially where they are become *Nottour* by the *ſubſequent Marriage*, that they are ſuſtained

ſuſtained though there be no *witneſſes.* Part 3. Tit. 2.

By *Our Law*, an *Obligation* in *write* is not *binding*; except it either be *delivered*, or *diſpenſe* with the not *delivery*; by a ſpecial *clauſe* therein; *nam traditione transferuntur rerum dominia*; but *tradition* is not requiſite in *mutual contracts*; and if the *write* be in his hand, in whoſe *favours* it is made, it is *preſumed* to have been *delivered*; and cannot be taken from him upon the *pretence* of not *delivery*; except it be *referred* to his *Oath* that it was never a delivered evident by the *Granter*.

Title

Title III

Of Obligations, and Contracts ariſing from Conſent, and Acceſſory Obligations.

THough all *Contracts* require the conſent of the *Contracters*; yet there are four, *viz. Emption*, *Location*, *Society*, and *Mandat*; which are ſaid in a more ſpecial way to ariſe from *Conſent*; becauſe theſe *Contracts* are perfected by meer *conſent of Parties*, without any further *ſolemnity*, or *tradition*; and thus how ſoon *two parties agree*, concerning the *price of any thing* that is to be *ſold*, that *Contract* is by meer *conſent* ſo far perfected, that he hath the *ſeller* pre-

Emo & Vend.

precisly obliged to *deliver* the thing bought and perfect the sale; albeit the *dominium* or property be not *transferred*, but remains with the *Seller* untill delivery; and if the thing *bought periſh* without the *Sellers fault*, even before delivery, the losse is the *buyers*, in respect of the *Personal obligement* upon the *Seller*, to deliver it, and the *buyers right is establiſhed* even before *tradition*; and though *earnest*, or *arles* be given as a *Symbole* or *mark* of *agreement*; yet the *consent* without the *earnest* or *arles* (as we call it) compleats the *bargan*; and if the *earnest* be in *current money*, it is to be imputed as a *part of the price*.

In this *Contract of Emption* and *Vendition*, their must be a price, consisting in *numerate*, and Emption.

Part 3. Tit. 3.

and down *told money*; for if one thing be given for another the *Law* calls that *Contract*, *Permutation*, or *excambion*, and not *Emption*, and *Vendition*; and this *price* muſt be certain and definite; but if the *price be referred* to another, the *bargan* will *ſubſiſt*; except that *third partie*, to whom it was *referred*, either will not, or cannot determine the price.

* Location.

Location and *Conduction*, is a *Contract*, *whereby a hyre is given*, *for the uſe and profite of any thing*, *or for the work of perſons*; It *differeth* from *Emption* and *Vendition*, chiefly in this, that the deſigne of that *Contract* is, to *transferr* the property; but in *Location* the property remains with the *Setter*.

This *Contract*, being entred into

into by the *mutual conſent*, and for the advantage of both *parties*; the *conductor* is only lyable, to uſe and adhibite a moderate *diligence*, for preſerving the thing ſet; that is ſuch *diligence* as *prudent men*, adhibite in their own *affairs*; ſo that if the ſame *periſh* without his *groſs and ſupine negligence*; or *fraud*, he is not lyable to make it up to the *Locator*.

Location or ſetting of *Lands* for a certain hyre, (called the *Tack-dutie*,) is frequent in *Scotland*; and it is to be obſerved that if the *Ground yield no increaſe*, but is abſolutely *barren*, without the Fault of the *Conductor*; the hyre will not be due, ſince that was given for the *profite* and *uſe* of the ground; But if there be not an *abſolute Sterility*; and that the *Land* yeild

Part 3. Tit. 3.

yield ſome *profite*, though never ſo little; the hyre will be due, if the *profite* but exceed the expence of the *labouring*.

From this *Contract* there ariſe *two Actions*, the one whereby the *Conductor* is obliged to pay the hyre agreed unto; and to reſtore the thing ſet after the end of the *Location*, in as good condition as he got it. The other is an Action whereby the *Locator* is bound to refound to the *Conductor*, the neceſſary expenſes imployed upon the thing hyred, during the *Location*. *Vide ſupra, Part 2. Title 6.*

Society

Society, is a *Contract*, whereby ſeveral perſons obliege themſelves to *communicate loſſe and gain ariſing from the things common in the Society.*

All

All the *Partners* in the *Society*, do by the *nature of this Contract* ſhare *equally*; except it be otherwiſe *provided*; and if either the ſhare of the *gaine* or *loſſe* be expreſſed, the one *regulates* ſtill the other; but becauſe ſome *Mens pains* are of as great *value*, as other *Mens money*, therefore it is lawful and conſiſtent with the *nature of Society* to contract ſo, as that one may have the *half of the gain*, and no *loſſe*; but the *Contract* would be *null*, if it were provided, *that one ſhould have all the gain and no loſſe*, for there could be no *compenſation*, though the other were never ſo skilful.

By this *Contract*, all the *Partners* are obliged to advance for the *affairs of the Society*, according to the ſhares they

they have in it.

The *Society* is *extinguiſhed*, and the *Perſons* who entered therein *looſed* therefrom by the death of any of the *Partners*; or by their becoming *inſolvent*; except it be otherwayes provided; for this is a *Perſonal Contract*, wherein Men reſpect the Humour and induſtrie of one another; and ſo this Contract is diſolved, by the *ſimple Renounciation* of any of the Partners; ſo that every one has a *Negative Vote*, and if the Society be entered into, with this condition, *that it ſhould not be diſſolved at the option of any of the partners*; *the Law did reprobate ſuch Pactions*; and from the *ſame principle* likewiſe it is, that *partners* in a *Society*, are not *lyable for further diligence*, then they uſed to *adhibite*

hibite in their own *affairs*; for having *voluntarly chooſed* one another for *partners*; it is preſumed they are *ſatisfied* with one anothers *diligence*, the *contract* being entered into for the *behoove* and *profite* of all the *partners*.

* Mandate.

**Mandate*, is that *Contract* whereby one *employes another to do*, or *manage any buſineſs*, *gratuitouſly*; for if he who is *employed* get a *reward*, it is not properly a Mandate, but *Locatio operarum*, or a *feeing of the perſon* ſo employed; but yet if the *receiver* of the *mandate* has been at any *expenſe* upon the *account* of the *mandate*, the *employer* muſt pay it.

He who receives the *mandate* is obliged to *execute the ſame*, according to the *rules preſcrived* by the *employer*, and not to exceed

Part 3. Title 3.

exceed the bounds of his *mandate*; And therefore if *Titius* imployed *Seius*, to buy him, ſuch a particnlar piece of Land for 10000 *lib. Titius* is obliged to *ratifie his bargan*; though he buy it for 9000 *lib.* becauſe ten comprehends *nine*; but if he pay 12000 *lib. for it*; he is not obliged to *ratifie* the bargan; becauſe he *exceeds the bounds of his Commiſſion*.

Mandates, expire either by the *revocation* of the *employer*, if the thing or *buſineſs* in which he was *employed* be *intire*; or by the *death* either of the *perſon employed*, or of the *employer*, or by the *renounciation* of the *perſon employed*; but in all thoſe caſes; if the *thing undertaken* be not *intire*; the *perſon employed* may and muſt proceed

proceed to *execute the mandate*, notwithſtanding of the *Revocation*, *death*, or *Renounciation*. Part 3. Tit. 3.

Mandatars are lyable for *exact diligence*, *& culpa leviſſima*; becauſe albeit the *Mandate* be only *gratia Mandantis*, yet the *very nature* of it implies *diligence*.

Mandates, are either *expreſs ariſing*, from *expreſs conſent*; or *tacit*, *which are inferred* by *ſigns* and *taciturnity*; as for *inſtance*, if a *perſon preſent* ſuffers another to *act in his affairs*; he is underſtood to give him thereby a *tacit mandate*.

Secundo, *Mandates* are either *general for managing all affairs*; or *ſpecial*, for doing ſome *particular buſineſs*, conform to the *preciſe tenor* of the *commiſſion*; & albeit *general mandates* contain a moſt ample power of *adminiſtration*; Gen. & Par. Mand.

Part 3. Tit. 3.

yet they are not extended to *committing of Crimes*: Or,

Secundo, to *Donations*; albeit where there is any probable cauſe, *gratifications* may be allowed; which will be regulate *ſecundum arbitrium boni viri*; this being *contractus bonæ fidei*, which implyes *exuberant truſt*.

Tertio, No *General Mandate* will imply a power to *alienate Immoveables*; or to ſubmit or tranſact any *litigious buſineſs*.

Quarto, If in the general *Mandate* ſome ſpeciall caſes are expreſt, it will not be extended to caſes of greater importance, than thoſe expreſt.

The great *favour of Commeree*, has introduced another kind of *tacit Mandate*; by which *Exercitors of ſhips*, and *Prepoſitors* are obliged by the

the Contracts of the *Maſters of the ſhips*, and of the *Inſtitors*, in relation to the Ships and Voyage; or to the particular *Negotiation* wherein they are intruſted. Part 3. Tit. 3.

Exercitor, is he to whom the profit of a Ship doth belong; whether he be the *Owner*, or hath onely *freighted the ſhip*: the *Maſter* is the perſon intruſted with the *charge of the ſhip*, who has power to oblige the *Exercitor*, by *contracting for the reparation, and outrigging of the ſhip*; and in matters relating to the *Voyage*. Exercitor.

Inſtitors, are intruſted with *particular Negotiations at land*, ſuch as keeping of Shops, *&c.* and they oblige their *Prepoſitors*, in relation to the affair wherein they are intruſted, as *Exercitors* are in *Maritim affairs*. Inſtitor

Part 3. Tit 3.

Neither the *Maſters* of ſhips, nor *Inſtitors*, need ſhow their *Commiſſion*, but their being in the *Office is ſufficient* to oblige the *Exercitors*, and *Conſtituents*. And if there be *many Exercitors* the *Maſters Contract* obliges them all *In ſolidum*; albeit what was borrowed be not employed for the uſe of the *Ship*; only it muſt be known to the *Lender*, that the *Ship* ſtood in need of ſuch *Reparations*; and the *facts* of the *Inſtitors*, will oblige their *Conſtituents* of whatſoever *Sex* or *Age* they be; and even though they be *Pupils*, *Minors*, or *Wives*, who cannot *validly oblige themſelves*; for they have themſelves to blame who Intruſted ſuch Perſons.

As

Part. 3. Tit. 3.

As all thoſe *Obligations* and *Contracts* ariſe from *expreſs conſent*, ſo others ariſe from *tacit conſent*; ſuch as *Homologation*; as for inſtance, though a man be not obliged by a bond granted in *Minority*; yet if he pay a part of it, or *annualrent* for it, after he is *Major*; the *Obligation* is thereby *homologated* or *own'd*, and becomes *valid*; not from the time of the *Homologation*, but from the date of the *Write*; and therefore it is fit that ſuch as deſign not to *own*, *null*, or *invalid deeds*, ſhould abſtain from doing any thing, that may *inferr* an *approbation* of them; but becauſe *Homologation*, is *actus animi*, therefore it ſhould not be proven by *witneſſes*.

Homologation.

Becauſe all *Obligations*, cannot be bound up under *general*

Part 3. Tit. 3.

and *regular names of Contracts*; therefore the *Law* allows ſome *Obligations*, to paſs under the name of *Quaſi Contractus*; becauſe they have the *reſemblance*, and are of the nature of *Contracts*; and theſe are *Negotiorum Geſtio*, whereby if any perſon manage your *buſineſs advantagiouſly* for you; you are lyable to him for his *expenſe*; though you gave him no *Mandate*; leaſt ſuch as are abſent ſhould be *prejudged* by the *negligence* of their *Friends*; as the *Manager* is lyable to refound to the *Perſon whoſe affairs* he *managed*, any *prejudice* done to him ſince, elſe any man might be *invited officiouſly*, to middle in another mans affairs to his *diſadvantage*, but this is to be underſtood, *ſi in utiliter geſſerit*; other-

Quaſi contractus.

Negotiorum Geſtio.

otherewiſe if he *acted profitably*; albeit the event do not ſucceed, he will get his *expenſes*. Part 3. Tit. 3.

The other *quaſi contractus*, are *Tutorie*, communion of goods, entering to be *Heir*, the *Obligation* of *repayment* that ariſes upon payment of what is not due; for if one be *Tutor* to you, he enters in a kind *of Contract* with you, whereby he is bound to *adminiſtrate* your affairs, and you are bound to pay him his *expenſe*; but of all theſe I have treated elſewhere in their *proper places*, as I ſhall do of *maleſices*, and and what reſembles them, when I come to *treat of Crims*; of which theſe may be properly ſaid to be *branches*. Tutory.

Having thus treated of *Principal Obligations*; the only *Acceſſory Obligation* that I need men-

Part 3. Tit. 3.

Cautioners.

mention is *Cautionary*; whereby one man becomes *ſurtie for another*; either to pay a *ſum*, or perform a *deed*; betwixt which two, there is this difference, that theſe that are *Cautioners for a ſum*, if they be bound conjunctually and ſeverally, with the *principal debitor*; may be purſued without purſuing the *Principal*: & *quoad* the *Creditor* they are *Principals*; but theſe who are *Cautioners* for performing of *deeds*; as *cautioners for Executors, and for Curators*, or *Factors*, or for *Meſſengers*, cannot be purſued till the principal be diſcuſſed, for they being only obliged, that their *Principals* ſhall *compt*, or be *honeſt*; therefore they cannot be lyable untill the *Principals* firſt be cited to compt in the one Caſe; or to

anſwer

anſwer for their *delinquencies* in the other; and they are onely lyable to make up what is wanting from their *Principals* after they are diſcuſt.

Becauſe *Cautioners* for ſums are lyable as *principals*; therefore their *Obligation* may ſubſiſt; though the *Obligation of* the *Principal Partie* be found *null*, or reduced by any priviledge given to the *Principal* by Law; as if a Man become *caution* for a *Minor*; or for a woman who is married, *Nam ſibi imputet*, who became a *Cautioner* for ſuch; but if the *obligation* was abſolutely *null* in it ſelf; as if the *Principal* did not ſign, then this *obligation* becauſe it is but *acceſſory*, retains ſo much of its own *nature* as to free the *Cautioner*.

Cautioners, are to get relief

Part 3. Tit. 3.

Relief of Cau:

from their Principals, not onely of the principal ſums, and annual-rents; but of all dammage, and intereſt; and whether the ſame be provided by the bond or not; and where there are many *Co-Cautioners*; they are lyable *in ſolidum, quoad* the *Creditor*; but if any of them pay the whole ſum to the *Creditor*; though he get aſſignation from him to the whole; yet he muſt onely ſeek his *relief* from the other *Cautioners*, with *deduction of his own part*; which proceeds; albeit *there* be no *clauſe of mutual relief* in the *bond*; and they muſt communicate to their *Co-cautioners*, what eaſe they get by way *of Tranſaction* from the *Creditor*; but if they get the ſaid eaſe by a meer *Ratification*, as by *Donation, &c.* then they are not bound to communicate

municate what eaſe they get; for a *Creditor* may juſtly gratifie one of his *Cautioners* as his Friend, or Relation, without being obliged to gratifie the reſt.

To make *Obligations* effectual, it is neceſſar that the ſubject matter thereof be ſuch as will admit of an *obligation*; For, no man can oblige himſelf, to do what is either *impoſſible*, *unlawful*, or *diſhoneſt*; nor to tranſmit the *property of* things *Sacred*; (theſe not being in *comercio*,) and albeit when the *Performance of obligations* becomes impreſtable, the *Party* is lyable for the Value, as *Dammage* and *Intereſt*; yet in theſe the Value is not *due*, nor will he be lyable in a *penalty*, in caſe of not *performance*.

But

Part 3. Tit. 3.

But yet a Man may *oblige himself*, to do ſomething not in his own power, as to cauſe another *diſpone Lands*; and if he *fail*, he will be lyable *pro damno & inter eſſe*; or for the *penalty*.

Donations.

Amongſt *Obligations*, *Donation* is alſo reckoned, which is an *obligation* proceeding from a *Lucrative cauſe* or *title*; For he who *voluntarly*, and *gratuitouſly* promiſes to give any thing, is thereby obliged to deliver the ſame; and this *Voluntar giving*, is called, *a Donation*, which is in *Law* defined to be *A meer Liberality proceeding from no previous compulſion.*

It may be *perfected* either by *Write*, or without it; but if without *Write*, it muſt be proven

proven by Oath.

Part 3. Tit. 3.

Donations, are either *Simple*, *Remuneratory*, or *Mortis cauſa*, that is to ſay, *Donations made in contemplation of Death.*

Remuneratory Donations.

A *Remuneratory Donation*, called Αντιδοροι, is when a Man *beſtowes any thing not gratuitouſly*, but to *requite and repay ſome good deed done, or to be done to him*; and ſo is not purely a *Donation.*

Donations in Contemplation of Death.

A *Donation in contemplation of Death*, is, when the *Giver deſigns rather the Perſon to whom he gifts to have what is gifted, than any other; but wiſhes himſelf to have it, rather than him to whom he gifts it:* And therefore, though *pure Donations* are not *Revocable*, yet a *Donatio Mortio cauſa* is; being of the nature of a *Legacy*; and no Donation is preſumed to be

Donatio

Par: 3. Tit. 3.

Donatio Mortis cauſa, except it appear to be ſo, either expreſly, or by ſtrong preſumptions, that the thing *gifted*, was onely *gifted in contemplation of Death.*

Gifts.

Gifts, being a meer *Liberality*, are not preſumed; and therefore by *Our Law*, *Debitor non præſumitur donare quam diu eſt debitor:* But this being onely a *præſumptio Juris*, may be taken off by ſtronger Arguments, juſtly inferring, that *Donation* rather than payment was deſigned.

Title

Title IV.

Of the Diſſolution, or Extinction of Obligations.

HAving cleared how *Obligations* are conſtitute; It remains now to conſider how they are *taken off*, and *extinguiſhed*; which is either by a *contrary conſent*, or by *implement* and *ſatisfaction*.

Since *Conſent* is neceſſary to the *conſtitution of obligations*, ſo a *contrary conſent*, whether by a *Diſcharge*, or *pactum de non petendo*; does diſſolve and extinguiſh Obligations; *nam nihil eſt tam naturale, quam eo genere quidque diſſolvere quo colligatum eſt* Conſent.

Part 3. Tit: 4

eſt; And therefore, if the *obligation* be conſtitute by *Write*, it requireth *Write* to the diſſolution thereof, which is called a *Diſcharge*; And *Diſcharges* require the ſame ſolemnities that *obligations* do; but yet, if the *obligation* was ſatisfied, *via facti*, as by *intromiſſion* with Rents of Lands, *&c.* it is probable by Witneſſes, as all Facts are.

Diſcharge.

Diſcharges, are either *general of all that Parties can ask, or claim*; Or *particular*, *of one particular thing or ſubject*: And in *general Diſcharges*, if any particular thing be expreſly diſcharged therein, the *general clauſe* will be extended to *particulars* of no greater importance, than what is expreſly diſcharged.

Diſcharges general and particular.

Diſcharges do ordinarly bear a clauſe,

clauſe, *diſcharging all preceedings till their date*; and albeit they do nor, yet three *conſecutive diſcharges*, do preſume, that all bygones are ſatisfied, if they be immediately ſubſequent to one another, and granted by *Parties*, having power to *diſcharge* as *diſcharges* by *Heritors*, or *Chamberlains*, to their *Tenants*; and therefore diſcharges of 3. *ſubſequent years* granted by *Merchants*, who bought the Ferm of theſe *years*, will not inferr the preſumption; but it will be inferred by Diſcharges for a part of the three years granted by the Father, and the reſt by his eldeſt Son, as Heir; the Diſcharges being in *Write*, containing a *diſcharge of the whole years Rent*; ſo that *partial Receipts*, albeit they extend

Apochatrium annorum.

Part 3. Title 4.

tend to more than the years Rent, will not preſume, *that all preceedings are payed*; neither one Diſcharge for three *ſubſequent terms*, or *years*, the *preſumption* being inferred from renewing *of the Diſcharges each year*, without Reſervation.

Payment.

Obligations, are *extinguiſhed*, and *diſſolved* by payment, which is, the *performing of the obligation* in *the preciſe terms thereof*, and is ſo *favourable*, that if it be made *bona fide*, it *diſſolveth the obligation*; albeit he to whom it was made, had no right; ſo payment made to a *Procurator* after the *Procuratorie* was *revocked* without the *payers* knowledge, will be ſuſtained; and payment made to *Miniſters* ſerving the *Cure*, though they have no *Title* to the *benefice*, will *liberat the Payers*. *Obli-*

Obligations are likewiſe fulfilled by *acceptilations*, which is an *imaginary ſatisfaction*, as if it were *truely performed*, and has the *effects* and all the *priviledges of payment.*

Acceptilation

Secundo, by *compenſation*, whereby if the *Creditor* of a *liquid ſum*, become *Debitor* to his *Debitor*, in another *liquid ſum*, the two *obligations extinguiſh* each other *ipſo jure*; and is *equivalent* to *payment in all* caſes, but if the *ſums* be not *liquid*, or if a *ſpecies* or *body* be craved to compenſe a *liquid ſum* it will not be allowed.

Compenſation.

Tertio, *Obligations* are taken away by *Innovation*, which is, the *changing one obligation for another*, and if the perſon of the *Debitor* be changed, it is called *delegation.*

Innovation

Innovation is never preſumed except

Par. 3. Tit. 4.

except it be *expreſly mentioned*, or that the *obligation* bears expreſly to be in *ſatisfaction of the former.*

Quarto, Obligations are extinguiſhed by *Confuſion*; that is to ſay, when the *Debt* and *Credit* meet in the ſame *Perſon*; as when the *Debitor* ſucceeds to the *Creditor*, or the *Creditor* to the *Debitor*; or a *Stranger* to both; and the reaſon of the *Extinction* in theſe caſes, is, becauſe the ſame *Perſon* cannot be both *Debitor* and *Creditor*.

Confuſion.

Title V.

Of ASSIGNATIONS.

ALL Rights, whether Heritable or Moveable, are tranſmiſſiable by *Aſſignation*; but if a Seaſin once be taken, the Right is not Tranſmiſſable by an *Aſſignation*, but by a Diſpoſition; except Liferents, which are Tranſmiſſable by *Aſſignation* even after Seaſin; becauſe they can admit of no *Jubaltern Infeftments*. Aſſignation.

He who grants the Aſſignations is called the Cedent, and he who receives it, is called the *Aſſignay*.. Cedent & Aſſig.

Aſſig-

Part 3. Tit. 5.

Aſſignation to a Right is compleated by Intimation; and therefore in competition betwixt diverſe aſſignays, the firſt *intimation* is alwayes preferred; This *intimation* is made by a *Procurator*, who takes *inſtruments* in the hands of a *Notar*, that ſuch an *aſſignation* was *intimat*, (ſo that one man cannot be both *Notar* and *Procurator*;) and if after this the *Debitor* pay the *Cedent*, he muſt repay it to the *aſſignay*; becauſe the *Cedent* was denuded by the *aſſignation*; and for the ſame reaſon, the *Cedents oath* will not prove againſt the *aſſignay* if the *aſſignation* be for an *Onerous cauſe*.

Intimation.

But if the *aſſignation* be *Gratuitous*; or for the *Cedents* behoof; or if the matter be

be *litigious*, and after a *depending Proceſs*; in any of theſe caſes the *Cedents oath*, will prove againſt the *aſſignay*. Part 3. Tit. 5.

A *purſute* or *charge of horning* upon the *Action aſſigned*, has likewayes the *force* and *effect* of an *intimation*; but an *Inhibition* againſt the *Cedent* upon the *aſſignation*, will not *ſupply intimation*.

The *Debitors* private knowledge of the *aſſignation*, is not equivalent to an *intimation*; but his paying a part of the *ſum*, or *annualrent* for it, is equivalent to an *intimation*; and much more the *writting a letter* promiſſing to pay; ſince that is in effect a *renewing the Obligation*.

Bills of Exchange, and *orders by Merchants* to pay, need not be

Part 3. Tit. 5.

be *intimated*; because in *Commerce* we are Governed by the *Law of Nations*; nor need *assignations* to *reversions* be *intimated*; because the *registration* is a *publicati n* of them, nor *legal & judicial assignations*, such as *apprisings*, *adjudications*, and *Marriage*; and that because they are past, and expede publictly.

Blank Band.

A *Blank Band* is equivalent to an *assignation*; and so must be intimated; and in *competition* with other rights, it is only preferred according to the date of its *intimation*, that the receivers name was filled up in it.

It is a *general principle* in Our *Law*, *that in the competition of moe Creditors, the first compleat diligence is still preferred*; And therefore, an *Assignation* is preferred to an *Arrestment*, if it

it be *intimate* before the *arreſtment*; but if the *imtimation* and *Arreſtment* be in one day, they come in *pari paſſu*; except the *Arreſter* be in *mora*, and do no *diligence* upon his *Arreſtment*. Part 3. Tit. 5.

Title V.

Of Arreſtments and Poyndings.

THE *ordinary Diligences*, in *Our Law*, affecting *Moveable Rights*, are *Arreſtment*, which anſwers to *Inhibition* in *Heritage*, and *poynding* which anſwers to *Compriſing* in *Heritage*. Of Arreſtments and Poyndings.

Arreſtment is the *cammand of a Judge*, *diſcharging any*

Part 3. Tit. 5.

Perſon in whoſe hands the Debitors Moveables are to, pay or deliver up the ſame, till the Creditor who has procured the Arreſtment to be laid on, be ſatisfied.

Arreſtments may be laid on, by any *Judge* in whoſe *Territories* the goods are; or by the *Lords of the Seſſion* wherever they lye, and that by *ſpecial letters of Arreſtment*; or by a warrand expreſt in the *ordinarie letters of horning*: theſe *letters* are execute by a *Meſſenger*, and if after it is laid on the *partie* in whoſe hands it is made, *pay*; he may be forced to pay the ſame over again, or may be purſued *Criminally* for breaking *Arreſtment*, the puniſhment being *confiſcation* of *Moveables* and their perſons to be in the *Kings will* *.

*K.J.6. Par. 7. act 118.

Arreſtment can only affect *moveables*

moveable ſums, and the *ground* thereof muſt be for *payment* of *moveable debts*, or *ſums* due on *Heritable ſecurity*, if no *infeftment* has followed *, and it reaches only to the *ſums* already due, or for which the *year* or *term* is *current*. Part 3. Tit. 5. *K.C.2 Par. 1. Seſſ. 1. Act 51.

How ſoon on *Action* is raiſed againſt a *Perſon*, his *Goods* may thereupon be *arreſted*; and this is called an *Arreſtment* upon a *Dependence*; but this *Arreſtment* may be looſed by *letters* for looſing of *Arreſtment*, which paſſes upon a *Common Bill*, and a *Band of Cautionry* is given to the *Clerk of the Bills* *, wherein the *Granter* of the *band* obliges himſelf to pay the *ſum*, if the *Arreſtment* be found *lawful*, and the *ſums or goods decerned*, to belong to the *Arreſter*; but *Arreſtments* *K.J.6. Par. 22. Act 17.

Part 3. Tit. 5.

upon a *Decreet* or (which is *equivalent*) on a *Regiſtrat Band*, cannot be looſed at all; Except the *decreet* be turned unto a *libel*, that is to ſay, the *Lords* do only ſuſtain the *Decreet* as a *libell* or *ſummonds* againſt the *Defender*, or that the *Arreſtment* was laid on after the *Decreet* was *ſuſpended*; for in either of theſes caſes *Arreſtments* may be looſed even upon *Decreets*.

Arreſtment being but a *Perſonal Prohibition* againſt the *Defender* to pay, it laſts no longer than the *lifetime* of him in whoſe hands the *Arreſtment* is made; except it be renewed againſt his *Succeſſors*; but it dyes not with him in whoſe *favours* it was raiſed, nor with him for whoſe *debt* it was laid on; and if the *debt* be not *liquid*, the *Debitors repreſentative*

*L. Par. act 11.

ſentative muſt be called to the *Liquidation*. Part 3. Tit. 5.

In the *Competition* amongſt moe *Arreſters*, preference is granted according to the *Priority* even *of hours*; and the firſt *Arreſtment* is not preferred if the *Poſteriour Arreſter* get the firſt *Decreet*, to make the *Arreſted goods forthcoming*; for *arreſtment*; being only an *inchoat diligence*, it is compleated by the *ſentence* to make *forthcoming*; and yet if the *Arreſter* did *exact diligence* to obtain a *Decreet*; his raiſing the firſt *purſute*, will *prefer him*. He alſo who *arreſts* on a *Decreet*, will be *preferred* to him who *arreſts* on a *dependence*; and he who *Arreſts* after the *term of payment* will be preferred to him who *Arreſts* before the *term*.

The *Kings penſions* and *gra-*

Part 3. Tit. 5.

tuitous aliments cannot be *arreſted*; becauſe they are given for a *particular and favourable uſe*; and not *applicable* to the *Arreſter*.

Poinding:

Poynding may be likewiſe uſed againſt *moveables*, by *vertue of letters of horning* againſt the *Debitors*; containing *poinding* or any other inferiour *Judge*, his *Decreet* or *precept** which is done by a *Meſſenger* after the dayes of the charge are *expired* *, the form thereof is; The *Meſſenger* after *poynding* the goods, *appriſes* them upon the *ground* where he *apprehends* them; and offers them to the *Debitor*, for the *ſum* for which they were *appriſed*, and if he compear not, he *carries them to the mercat croſs of the head burgh of the ſhire*, or other *Juriſdiction* where they are

*K.J.6. Par. 12. Act 10. K.Ch.2. Par. 1. Seſſ. 1. Act 29.

*K:C:2 Par: 2: Seſſ: 1: Act 4:

are *poinded*, and there he *appriſes them*, and delivers them to the *Party*, who is called the *Poynder* : but if any compear, and offer to *make Faith that the goods belong to them*, and not to the *Debitor*; then the *Meſſenger* muſt deliver them to that *Party*, elſe he is lyable in a *ſpulzie*.

Poynding, is a *judicial ſentence*, and the *Meſſenger is Judge conſtitute by the letters*; the *Meſſenger writes likewiſe an execution of poynding* and th at *execution* is better believed than any who offers to prove the *contrare*; for that *execution* is onely quarrela ble by *improbation*.

Arreſtment, being but an *inchoat diligence*, diſcharging the *Partie* in whoſe hand the *Arreſtment* is made, to pay, the *right* to the *goods arreſted*, re-

Part 3. Tit. 5.

main ſtill in the *Debitor*, and may be *poynded for his debt*; for *poynding is a compleat diligence*, giving an abſolute right to the *goods poynded.*

Labouring *Oxen*, or other *Plough Goods* cannot be *poynded* in time of labouring (leaſt labouring ſhould be otherwayes diſcouraged;) except there be no other Moveables upon the ground to be poinded *.

Labouring *oxen*

*K. J. 4 par. 6. Act 98.

Title

Title VI.

Of PRESCRIPTIONS

PRescription being a way *of evacuating* and *annulling* both *Heritable*, and *Moveable Rights* comes in here, after both theſe are explained. Peſcr.

Preſcription is defined, an *Acquiſition of Propertie by the Poſſeſſors continuing his poſſeſſion for ſuch time as the Law determines*; Which was introduced not onely for puniſhing the *negligence of the Proprietar*, who owned not his *Right* for ſo many years; But likewayes, for ſecuring Poſſeſſors, and ſuch as derived *right from them*; and leaſt by a conſtant uncer-

Part 3. Tit. 6.

tainty, the *Poſſeſſors* being unſecure, might neglect the *improvement of what they poſſeſſed.*

Pref: of Herit. Rights.

Heritable Rights, (under which I comprehend *Wadſets*, *Heritable Offices*, *Servitudes*, *Patronages*, *&c.*) and all Actions depending upon them, or relating to them, preſcrive with us in 40. years; if the *Poſſeſſor* being a *ſingular Succeſſor*, have a *Chartor*, *Diſpoſition*, or *Precept*, and *Seaſin* in his Perſon; or being an *Heir*, have a conſtant tract of *Seaſins*, continuing and ſtanding toge. ther, for the ſpace of 40. *years*, flowing upon *Retoures*, or *Precepts of Clare conſtat*; For, the *Law* did not truſt a *Seaſin* alone, it being onely the *aſſertion of a Notar.* But *Reverſions* which are in the body of the *Poſſeſſors right*; or *reverſions* duely

duely *Regiſtrated*, preſcrive not. Part 3. Tit. 6.

All *Perſonal Rights*, and *Actions* relating to them, preſcrive likewayes in 40. years; If a *Document* be not taken upon that *Right*, that is to ſay, *If nothing be done, whereby the true Proprietor declares his intention to follow and own his Right* *. Preſ: of perſonal Rights.

In both theſe *Preſcriptions*, the extraordinary length of time, ſupplies the want of *bona fides* in the *poſſeſſor*; But, no length of *time* can make the *poſſeſſor* preſcrive things *Sacred*, *Religious*, or *publick*; nor yet things *ſtolne*, or *robbed*, *Ob vitium reale*, which affects ſuch things. *K. J. 3. Par. 5. Act. 29. Par. 7. Act 55:

Actions of Spulzie, and *Ejection*, preſcrive in three years, after committing thereof; as to the *ſpecialities* of theſe Actions, *viz.* the violent *profits*, and

Part 3. Tit. 6. and *Oath in litem*; But *Minors* have three *years* after their *Majority* *.

*K.J.6. Par. 7. act 119. As do alſo *Actions* for *Servants Fies*, *Houſe meals*, and *Marchant compts*; except they can be proven after theſe three *years*, by the *Debitors* *K.J.6. *oath* *: And removings, if Par. 6. *Action* be not intended with- Act 83. in three *years* after the warn- *K.J.6. ing *.

Par. 6. Act 82. If *Aſſyſers* err in ſerving a man *wrongouſly Heir* to his Aſſyers. *Predeceſſor*, the *Retour* may be quarrelled within 20 *years*; but the *Aſſyſers* themſelves can only be *purſued for error*, within three *years* *, but the *right* *K.J.6. *of blood* it ſelf never *preſcrives*; Par. 22. and therefore a man may be Act 13. *ſerved Heir to his Father or Grand-Father*, after a 100 *years*, being debarred by no time;

nam

nam jura ſanguinis nullo jure civili adimi poſſunt.

If a Perſon who is *forefaulted poſſeſſed lands* 5 *years* before the *forefaultur*, without *interruption*, the *King* is obliged to ſhow no *right*, in the perſon of him who was *forefaulted* to the *lands*, or others that he poſſeſſed; becauſe its preſumed that the perſon *forefaulted* would abſtract the *writs*, which *quinquenrial poſſeſſion* is to be tryed by an *inqueſt of the Shire, where the land lyes* *. Forfeiture:

*K. J. 6. Par. 9. Act 2.

Arreſtments on *Decreets* and *depending actions* preſcrive within five *years* after ſentence.

Meals and *Duties* due by *Tennents preſcrive*, if not perſued within five years, after the *Tennents* removing; *Miniſters ſtipends*, and *multurs* preſcrive ſo that they cannot be *purſued after five years*, except they be proven

ven by the *Debitors oath*.

Part 3. Tit. 5. *Holograph Bands*; and *ſubſcriptions* in *compt books*, preſcrive in *twenty years*; except they be *proven* by the *debitors oath*.

And laſtly, all *bargans* probable by *witneſſes*, all *actions* on *warnings*, *ſpulzies*, *ejections*, *Arreſtments*, *Miniſters ſtipends*, &c. *preſcrive* within *ten years*; unleſs *waked* every five *years*; but this alters not any ſhorter *preſcriptions* of theſe *actions* *.

*K.C.2 Par. 2. Seſſ. 1. Act 9.

All theſe *preſcriptions* run *de momento in momentum*; ſo that the *preſcription* runs till the *laſt moment* of the time allowed; but they run only from the time wherein the *debt could* have been *purſued*, ſince till then the *Proprietar* could not be called *negligent*, which *negligence is the foundation*

of

of preſcriptions; and therefore *preſcription runs not againſt a band from the date of a band*; but only from the *term of paymennt*; and *preſcription of an action of warrandice*, runs only from the *eviction* *; becauſe no man is lyable in *warrandice*, till the *lands be evicted*; and from the ſame *principle* it is, that *contra valentem agere non currit, preſcriptio*; and that *preſcription* runs not againſt *Minors*, in whom *negligence is not puniſhable*, ſince it proceeds from no *deſign*; but from the *unripneſs* of their *Age*. Part 3. Tit. 5. *K. J. 6. Par. 22. Act 12.

Vaſſals cannot *preſcrive againſt their Superiours*; becauſe the *Vaſſals right* acknowledges the *Superiours*; nor can *Laicks preſcrive a right to teynds* being incapable of ſuch *rights* after the *Lateran Council*; but though the

Part 3. Tit. 5.

the *right it self prescrives*, in neither of these cases, yet the bygons due by *vertue* of these *rights before fourty years*, may *prescrive.*

Prescription

Prescription runs against the *Kirk, and Mortifications*; but on the other hand, because *Church men are negligent*, and *rights may be lost* in the *change of Intrants*; therefore, 13. *years possession*, is sufficient to maintain a *Church man in possession*; which is called, *decennalis & triennalis possessio*; and is a *presumptive title*, and sufficient till a better be shown, by which it may be excluded; *for præsumptio cædit veritati.*

Prescriptions run likewayes against the *King*; except as to His *Majesties annext propertie*; or to his *unannext propertie* whereof the *ferms, duties* or

feu

feu ferms, have been compted for in *Exchequer*, ſince *Auguſt* 1455. *years.* Part 3. Tit. 5.

Any deed, whereby the *true proprietar* owns his right, during the courſe of the *preſcription*, is called *interruption*; and *preſcription is interrupted* in *Our Law*, either by a *proceſs*, or a *charge raiſed within the years of the preſcription*; though the *citation* was only on the firſt *Summonds*; and though the *Summonds* was paſt from, *pro loco & tempore*; But *interruption* by *citation*, is not ſufficient unleſs it be made by *Meſſengers* perſonaly or at the parties dwelling houſe, and that it be renewed every *ſeven years* *; and that the *Execution be ſigned by the Meſſenger* and *witneſſes* *. Interruption] *K.C.2 Par. 2. Seſſ. 1: Act 9. *K:C:2 Par: 3. Act 5.

Interruptions made againſt the *principal party*, interrupt as to

Part 3. Title 7.

to *Cautioners*; and interruption as to a part interrupts the *preſcription* of the whole; ſo that if a man *arreſt* the meals and duties of any part of a *Barrony*, he interrupts *preſcription*, as to the whole *Barrony*.

Title VII.

Of Succeſſion in Heritable Rights.

HAving formerly ſhewed how *Rights* whether *Heritable*, or *Moveable*, *Real*, or *Perſonal*, are conſtitute, and how they are tranſmitted to ſingular *Succeſſours*: It remains now to conſider how theſe

theſe *Rights* are tranſmitted by *ſucceſſion*, beginning firſt with *Succeſſion* in *Heritage*. Part 3. Tit. 7.

An *Heir*, is he that *ſucceeds univerſally to all that belonged to the Defunct*; and is therefore in the conſtruction of Law, *one and the ſame perſon with the Defunct*. Heir:

Though the *Executor*, be in effect the Heir in *moveable Rights*; yet we call thoſe only *properly Heirs*, *who ſucceed in Heritage*; and with us there are ſeveral kinds of Heirs diſtinguiſhed by their ſeveral *denominations*.

The firſt, and chief kind of *Heirs*, are the *Heirs of lyne*, who are ſo called, becauſe they ſucceed *Lineally*, according to the *right of Blood*; and they ſucceed thus, Heir of Line:

Firſt, *Deſcendants*, according to

Part 3. Tit. 7.

to the *proximity of their Degree*, in which the eldeſt Son is preferred to all his Brothers, and all the Brothers to the Siſters; and if there be onely Siſters, they ſucceed all equally.

Grand Children.

The next degree, is *Grand Children*, and their great *Grand Children*, *&c.* who ſucceed all in the ſame way.

Collaterals.

If there be no *Deſcendants*, then *Collaterals* ſucceed, in which, the firſt degree is *Brothers*, and *Siſters German*, for the *whole blood excludes the half blood*; and *Brothers* the *Siſters*; and *Brothers* by the *Fathers ſide* exclude *Brothers* by the *Mothers ſide*; there being no Succeſſion with us by the *Mothers ſide.*

Failing *Deſcendants*, and Brothers and Siſters, the Succeſ-

ceſſion aſcends; and all the *Aſcendants* ſucceed upward, according to their degrees *of Proximity*, as the *Deſcendants* did downward; and thus the *Father* ſucceeds to his own *Son*; and failing him, the *Grand Father*, *Great-Grand-Father*, *&c.* and failing of *Aſcendants* in the *right Line*, the *Collateral Aſcendants* ſucceed in the ſame way, and thus the *Fathers Brother*; or if there be no *Brothers*, the *Fathers Siſter* ſecludes the *Grand Fathers Brothers*, or *Siſters*, *&c.* Part 3. Tit. 7.

It is to be obſerved that in *Heritage*, there is a *Right of Repreſentation*, whereby the *Deſcendants* exclude ſtill the *Collaterals*; though nearer by many Degrees to the Stock, or *communis ſtipes*; And thus the great Repreſentation.

Part 3. Tit. 7.

great Grand-Child of the eldeſt Son ſecludes the ſecond Brother; becauſe, he comes in place of, and ſo repreſents the elder Brother, his *great Grand-Father.*

The *Heir of Line*, has Right to the *Heirſhip moveables*, and excludes all other *Heirs* therein; *Heirſhip moveables are the beſt of each kind of moveables*, which is given to the *Heir*; becauſe he is excluded from all other Moveables; if there be *pairs*, or *dozens*, he gets the beſt *pair* or *dozen*; but in others he gets onely *one ſingle thing*; None have right to *Heirſhip moveables*, but the *Heirs of Prelates*, under which are comprehended all *Beneficed Perſons*, the *Heirs of Barrons*, under which are comprehended all who are *infeft in Lands*

Heirs of Line.

or

or *annualrents*, though not erected in a *Barrny*; And the *Heirs of Burgeſſes*, by which are meaned, *actual Trading*, but not *honorarie Burgeſſes*. Par: 3. Tit. 7.

If the *Defunct* had any *Lands*, or *Heritable Rights*, to which he could not ſucceed as *Heir of Line*, then he who ſucceeds in theſe, is called, *the Heir of Conqueſt*; and the *Rule* is, that *Heritage deſcends* and *conqueſt aſcends*; ſo that if the midle *of three brothers dyes*, his immediate elder brother would be his *Heir of conqueſt*; and if a Son of a *ſecond Marriage* dyes, leaving *three brothers of a former Marriage*, the youngeſt would ſucceed in his conqueſt lands; and this I conceive was introduced, for enriching the elder brothers, whom *Our Law ſtill* Heir of Conqueſt.

favours

Part 3. Tit. 7.

favours; whereas *heritage* muſt deſcend according to the *Law of Nature.*

Conqueſt.

Theſe *Heirs of conqueſt*, have right to all *lands*, *annualrents*, *heritable bands*, and others; whereupon *infeftment* did or might follow, but they have no right to *tacks*, *penſions*, *moveable Heir-ſhip*; and all other *rights*, having *tractum futuri temporis*, and requiring no *infeftment*, and ſo not *competent to Executors*; all which belong to the *Heir of line.*

Heirs Male.

The *Heir Male*, is the neareſt *Male* who can ſucceed; and all *Heirs of Line*, are alſo called *general Heirs*; becauſe they ſucceed by a general ſervice and repreſent the Defunct univerſally.

The *Heir of tailzie* is he

he to whom an Eſtate is *tailzed*, ſo called, becauſe the *legal Succeſſion* is cut off in his favours from the *French word*, *tailer*, *to cut*, and the matter of *tailzies* may be *Summond* up in theſe *few Concluſions.* Part 3. Tit. 7.

Primo, In *tailzies*, the perſon firſt named, needs not *be ſerved Heir*; as for inſtance, If I take my land to my ſelf, which failing to *Seius*; *Seius* needs not be ſerved; becauſe there is no *cognition requiſite* to clear that he is to *ſucceed*; but if I take may lands to my ſelf, and my *Heirs*; or to me, and the *Heirs of ſuch a Marriage*; which *failing to Caius*; then either *Caius* in the one caſe; or the *Heirs of ſuch a Marriage* in the other, muſt be ſerved; becauſe, it is requiſite to inquire, *Whether there*

were Heirs, or *who is Heir of that Marriage?*

Secundo, In all *tailzies*, he on whom the laſt termination falls is *Fiar*; as for inſtance, *If I take my lands to* Seius, and *failing him to* Caius, *and his Heirs*; *Caius* is *Fiar*, and *Seius* is onely *Liferenter.*

Tertio, Though the laſt termination fall on the *Wifes Heirs*, the *Husband* remains *Fiar*; becauſe of the *prerogative of the Sex*; as for inſtance, *If I take my land to my ſelf, and my Wife, which failing to her heirs, my heirs would be preferred*; except the eſtate belonged to my *Wife* as *Fiar*; For then her *heirs* would be *preferred.*

Quarto, Though in *Conjunct-Fie Rights*, if I take my lands to my ſelf, and my Wife in *Con-*

Conjunct-fie, which Failing to our *Heirs*, my *Heirs* would be preferred, as to *heritable Rights*; but in *ſubſtitutions to moveables*, the *Right* would divide betwixt her *Heirs* and mine. Part 3. Tit. 7.

Quinto, The *Heir of Tailzie*, has but a *hope of ſucceſſion*, and ſo the *Fiar* may diſpone; nor can the *ſubſtitutes*, or *remoter members* of the *Tailzie*, hinder him by *Action*, *Inhibition*, or otherwayes; except there be a *clauſe irritant*, and *reſolutive*, declaring, that *if the firſt Member diſpone, his Diſpoſition ſhall be null*; in which caſe, though generally the *remoter member* muſt be ſerved *Heir*, to the immediate *prior* who was *infeft*; yet in that caſe, the *remoter member* may be ſerved Heir to the firſt Diſponer.

Sexto, If one oblige himſelf

Part 3. Tit. 7.

to make ſuch a man his *Heir of Tailzie*, that *Obligation* tyes him onely once to *tailzie his eſtate*; but not that he ſhall not break that *Tailzie*; except the *Obligation* be for an *equivalent Onerous cauſe*: Or if a perſon oblige himſelf to do nothing contrare to his *Tailzie*, he cannot thereafter make any *voluntar gratuitous Right* to the *prejudice of that Tailzie*; But yet the lands *tailzied* may be *compriſed*, or *adjudged* for ſums truely due, and not *doloſe* contracted, to diſappoint the *tailzie*.

Heirs of proviſion.

Heirs of Proviſion, are theſe who ſucceed by vertue of a particular *proviſion* in the *infeftment*; ſuch as are *Heirs of a* ſecond *Marriage*, and as to theſe *Heirs of Marriages*, we may obſerve two things; firſt, That

Part 3. Tit. 7.

That if a Father by his *Contract of Marriage*, be obliged to employ a ſum to himſelf, and Wife in *Conjunct-fie*; and the *heirs of the Marriage*, he cannot in prejudice thereof do any *fraudulent gratuitous deed*; tho he may provide a *Joynter* for a *ſecond Wife*; or *proviſions for his Children of a ſecond Marriage*.

Secundo, Though a Father may *aſſign* or *diſpone* ſums to Children, when extant, whereby they will be preferred to *poſterior Creditors* becoming *Fiars* by the ſaid *Rights*; yet if the Father *diſpone* to children to be *procreat*, this will be conſidered only as a *deſtination* and ſo will not hinder the Father to make *poſterior Rights*; or even *poſterior Creditors* to affect by *Diligences* what is ſo *diſponed*.

Part 3. Tit 7.

Tertio, *Proceſs* will be ſuſtained at the inſtance even of *the appearand Heir of the Marriage*, againſt the Father, to fulfill the *ſpecial obligations* therein, or to purge any deeds already done by him in *prejudice thereof.*

Albeit, where *Heirs* are not deſigned in any *right*, the *Heirs of Line*, exclude all other *Heirs*; yet if a man take lands to himſelf, and his *Heirs Male* tailzie, or *proviſion*; and thereafter acquire *reverſions*, or *tacks* of the ſame lands to himſelf and his *Heirs*; theſe rights will accreſs to that *ſpecial Heir*, to whom the land was *provided*; for it is not preſumable, that a man would give the lands to one, and the rights of them to another *Heir.*

When

When *women* ſucceed, all theſe of one Degree ſucceed *equally*, and becauſe the eſtate is divided amongſt them, they are called *heirs portioners*; the eldeſt not ſecluding the reſt, and having no advantage over him; but where the *Rights* are indiviſible, ſuch as *Titles*, *Juriſdictions*, *Superiorities*, and all the *caſualities of theſe ſuperiorities*: ſuch as *Ward*, *Marriage*, *Nonentrie*, *Feu duties*, *&c.* theſe fall to the eldeſt *heir Female*, without diviſion; together with the Principle Meſſuage, it being a *Tower*, or *Fortalice*; for other houſes are divided equally. Part 3. Tit. 7. Heirs portioners.

All theſe Heirs are lyable *in ſolidum*, if they once enter Heir; except *heirs portioners*, who are onely lyable *pro rata*, and *heirs ſubſtitute* in a ſum,

Part 3. Tit. 7.

who are onely lyable to *Creditors*, in the *value of the ſum*, to which they are ſubſtitute; But they have in SCOTLAND a Priviledge which they call, *the benefit of Diſcuſſion*, whereby the *Heirs of Line* muſt be firſt purſued, to *fulfill the Defuncts deeds*, or *pay his debts*; And next to theſe the *Heir of conqueſt*, the *Heirs Male*, the *Heir of tailzie*, and *Heirs of proviſion*; but for fulfilling a deed relating to *particular lands*, the *Heir* who ſucceeds in theſe *particular lands*, muſt be firſt purſued, without *diſcuſſing*; and that which is meant by *diſcuſſing*, *is that the Creditor muſt proceed by horning, caption and appriſing, againſt the Heir*, who is to be *diſcuſſed*; before he can reach the other *Heirs*.

Diſcuſſion.

An

An *Heir* is ſaid with us, to be *Heir active*, who is ſerved *Heir*, and may *purſue*, whereas he whom the *Law* makes lyable to be *Heir*, is ſaid to be *Heir paſſive*; As when the *appearand Heir is infeft* upon a precept of *clare conſtat* by the *Superiour*, or otherwiſe medles with his *Fathers Eſtate*. Part 3. Tit. 7.

Heir Active.

When the *Predeceſſor dyes*, he who ſhould be *Heir*, (and therefore is called, *appearand Heir*,) has *year* and *day* allowed him to deliberate *whether he will be Heir*, which is called, *annus deliberandi* *; and which is indulged by the Law; becauſe if a man enter once Heir, he is lyable to all the *debts* though *far exceeding the eſtate*; and within that *year*, he cannot be *purſued*, nor *obliged* to enter; but *after the*

Appearand Heir.

*Annus delib. K. Ja. 6. Par. 23. Act. 27.

Part 3. Tit. 7.

year is expyred, the *Creditor* may *charge him to enter Heir*, and if he reſolve not to enter, he muſt *renounce any Right* he has by a *writ under his hand.*

poſthum Child.

This year is compted from the *defuncts death*; except in a *poſthum child*, who has a year *allowed* him, after his *Birth*, and not only during this year; but after it *expires*, the *appearand heir* without inſtructing any *Title*, may purſue for *exhibition of all Rights made to his Predeceſſors*; and of all rights made by his *Predeceſſors*, to any in his own *Family*; but not to *Strangers*; to the end he may deliberate, whither he will *enter Heir*; and the *Liferenter* is bound to *aliment* the *appearand Heir*, not being able to *entertain himſelf*, though he

he renounce. *vid. ſupra Part 2. Title 9. § Liferents.*

Part 3. *Tit.* 7.

If the *appearand heir* reſolves to *enter heir to his Predeceſſor*, he muſt raiſe *Briefs* from the *Chancellarie*; which *Brief is a command from the King*. to the *Judge ordinary*, where the lands ly, to cauſe cite 15 *ſworn men*, to try whether the *raiſer of the Brief* be *neareſt heir*; and this is *executed* or *proclaimed* at the *mercat Croſs* where the lands lye; and if at the *day appointed*, theſe 15. *ſworn men* find him to be the next perſon who ſhould ſucceed, they *ſerve him heir* by a paper which is called a *ſervice*, and which being returned be them to the *Chancellarie*; there is a *write* given to the *heir*, whereby he is *declared heir*; and which is called, the *retour*, becauſe it is their anſwer, and return

Part 3. Tit: 7.

return to the *Chancellarie of the points* contained in the *brief*; and thereafter, the perſon who is *ſerved heir* is infeft by a *precepts* out *of the Chancellarie*; and *if the ſervice* was to any *particular lands*, it is called a *ſpecial ſervice*; but if there was no *land deſigned*, it is only called, a *general ſervice*; and this *general* ſervice is ſufficient to eſtabliſh a *right to heritable Bands*, *Diſpoſitions*, *Reverſions*, *Juriſdictions*, and all other *rights*, whereupon the *Defunct* was not *infeft*, nor needed to be *infeft*; and a *ſpecial ſervice* includes a *general ſervice* but not *E contra.*

general Brief.

The *general brief* hath only two *points or heads*, *viz.* if the *Defunct* dyed at the *Kings peace*; and if the raiſer of the *brief* be the next Heir; but the *ſpecial brief*

brief, has *ſeven*, *viz.* when the *Defunct* dyed. *Secundo*, If he dyed laſt *veſt*, and *ſeaſed*, at the *Kings peace*. *Tertio*, That the *raiſer is next heir*. *Quarto*, Of whom the Lands are holden *in capite*. *Quinto*, By what manner of holding. *Sexto*, What is their *old and new extent*. *Septimo*, Whether the *raiſer be of lawful age*; and in whoſe hands the Lands are at preſent. Part 3. Tit. 7.

Sometimes likewiſe, the *Vaſſal* without *ſerving himſelf heir*, gets a *precept of ſeaſin* from the *Superiour*; wherein, becauſe the *Superiour* declares, *that it is known to him, that ſuch a man is heir to his Father*; it is therefore called, a *Precept of Clare conſtat*; which therefore makes the Obtainer lyable *paſſive*, to all his *Predeceſſors debts*

debts; but gives him only *active right*, to the *Particular lands* contained in the *Precept*; nor will it give him a right even as to theſe lands, except againſt thoſe who derive *right* from the *Superiour* who gave it.

Bailiffs alſo of *Burghs Royal*, do *infeft* their *Burgeſſes* as *heirs in Burgage lands*, giving them *ſeaſin* as *heirs*, by delivering them for a *Symbole*, the *heſp* and *ſtaple of the doors*; and the *ſeaſin in that caſe*, is in place *of a ſervice*; as to theſe lands; but is not in other caſes a ſufficient *active title.*

The *heir* who is *Retoured*, holds either his lands of the *King*, and then he gets *precepts out of the Chancellary*, to the *Judge ordinary*, to *infeft* him; which if he *refuſe*, the *Lords* upon

upon a *Supplication*, will direct *Precepts* to any other *perſon*, who is thereby made a *Sherriff in that part*; but if the lands hold of another *Superiour*, then either that *Superiour* is *himſelf entered* or not; if he be entered, he will be charged by *four conſequutive Precepts*, to enter the Heir; and if at laſt he diſobey, his immediate *Superiour* will be charged, and ſo till the *heir arrive at the King* who never refuſes to enter any; and if the *Superiour* be not entered, he muſt be charged upon 40. *days to enter*, that being himſelf entered, he may enter his *Vaſſal*; and if he refuſe, or delay he loſſes all the Nonentries of his *Vaſſal*; but no other Caſualities; becauſe *quoad* theſe he was not *Culpable*. Part 3. Tit, 5.

Though

Part 3. Tit. 7.

Though the Perſon who ſhould be Heir, do not enter to his *Predeceſſors Heritage*; yet he may be made *lyable* to his *predeceſſors debt*, *by two paſſive titles*, relating to *heritable rights*; *viz. Geſtionem pro hærede*, and as *Succeſſor titulo lucrativo poſt contractum debitum*, and there is a third *paſſive title* relating to Moveables, which is called *vitious intromiſſion.*

Behaving as Heir.

Behaving as *heir*, or *Geſtio pro hærede*, is when the *perſon*, who might have been Heir, *immixes himſelf*, and intromets with either the *moveable heirſhip*, or any *heritable eſtate*, belonging to the *Defunct*; in which caſe, he is lyable to the *Creditors*, not only according to the value of what he *intrometted* with; but as far, and in the ſame manner as if he had been

been *entered heir*; and yet the *Lords* will not faſten this *paſſive title* upon a man; becauſe of its *extraordinary hazard*; where the *intromiſſion* is very ſmall; or where he has a *colourable title* to which he might *aſcrive* his *intromiſſion*, as a *factorie* from the *Compryſer*; or the *Donator* to the *Eſcheat*, or *recognition*; *Geſtio pro hærede*, being *magis animi quam facti*; which *factories* will defend; though there was no *Declarator*; but if the *appearand heir* had no *factorie*; it is not ſufficient to alleadge the *Defunct* dyed Rebell, and ſo could have no *heir*; except his *Eſcheate* was declared before intenting the *purſuers action*; nor will this *paſſive title*, nor *vitious intromiſſion* be ſuſtained; except they be purſued in the *intrometters own lifetime*, they

they being kinds of delicts.

But he will not be lyable, if the *Defuncts Right* was reduced, though after his *intromiſſion*; And ſince this *paſſive title* was introduced by the *Lords of Seſſion*, in Favours of the *Creditors*, to deter *appearand Heirs* from *fraudulent intromiſſion*; therefore an *appearand heirs*, paying his Predeceſſors debt will not infer this *paſſive title*; ſince that is for the advantage *of Creditors*; nor will the getting *of money* for ratifying a Compriſing that is expired, infer this *paſſive title*, ſince the *Creditors* would have got no Advantage by that Right; but if the *appearand heir* had conſented before the Compriſing was expired, it would be a *paſſive title*; becauſe as

heir

heir, he might have redeemed the *Compriſing*.

Succeſſ. tit. lucr.

Succeſſor titulor lucrativo, is, *where the appearand heir, to preclude the neceſſity of entring heir; and ſo being lyable to the Creditors, gets a Diſpoſition from him to whom he would have been Heir, without any Onerous cauſe*; the receiving whereof, though it be a ſmall part of the Eſtate, makes him lyable to the *payment of all the Creditors debt*; if the Right made, as well as the *infeftment*, was poſterior to the *Creditors lawfull debt*. But if there be an *Onerous Cauſe*; then either it is not near equivalent to the value *of the Lands diſponed*; and in that caſe, it will not defend againſt this *paſſive title*; Or, if it be near to the *value*, it will defend againſt

Part 3. Tit. 7.

againſt it, but not againſt *Reſtitution of that Value.* And ſince this *paſſive title*, overtakes ſuch as might have been Heirs; therefore, a Diſpoſition granted to a *Grand Child*, will make him *Succeſſor titulo lucrativo*, though the *Father* be alive; ſince by the *courſe of Succeſſion*, he might in time have been Heir, though he was not immediate Heir; but ſince this can onely reach *appearand heirs*; therefore, a Diſpoſition made by one *Brother* to another, though the Maker had no Children, will not make him *Succeſſor titulo lucrativo*, ſince the *Brother might* have had *heirs himſelf*; and ſo his *Brother* was not his *appearand heir.*

The *Paſſive title* holds onely in *heritage*; and therefore, the

getting

getting a right to *moveable heir-ſhip*, and *tacks*, will not infer the ſame.

Geſtio pro hærede, and *Succeſſor titulo lucrativo*, being *paſſive titles*, whereby *in odium* of the *irregularity of the intromiſſion*, they are made lyable as *heirs*; therefore, theſe *paſſive titles*, can extend no *further*, than if they *intromet with*, or take a *diſpoſition* to theſe things to which they might have ſucceeded; and ſo not inferred againſt an *heir of tailzie*, intromitting with, or getting a *depoſition* of what would have fallen to the *heir of Line*; nor can they be extended further, than if they had been *ſerved heirs*; and thus an *heir portioner* will be no further lyable in theſe, than *pro rata*, if ſhe had entered; for the *coppie* ſhould

Part 3. Tit. 7.

ſhould go no further than the *original.*

Rights on Death-bed.

To conclude, the *Succeſſion in heritage*, it is fit to know, that by an *old ſtatute* *and our *conſtant practique*, *a man cannot diſpon his heritage upon death bed*, in *prejudice of his heirs*; (that is to ſay, neither lands, nor heritable bands, nor any band, though Moveable, in ſo far as his *heritage* may be thereupon *appriſed or adjudged*;) ſo jealous was *Our Law* of the importunity of *Churchmen*, and *Friends*, and of the *weakneſs of mankind*, under ſuch *diſtempers*; and therefore, if a man has made any right in *prejudice of his heir*, after contracting *ſickneſs*, though he was ſound enough in his *Judgement* for the time, and continued ſound, for a very long time

*Stat. Will. Reg. cap. 13.

time; yet this *right* will be reduced, as done *in lecto*, or upon *death bed*; either at the inſtance of the *appearand heirs*, or at the *inſtance of the apprearand heirs* Creditors; and it is ſufficient to *prove ſickneſs*, though it be not *proved mortal*, and that he was *ſick*, without proving that he dyed of that *ſickneſs*, or was *ſick* the very time of the *diſpoſition*.

If thereafter, the *maker* of ſuch a right come to *Kirk* or *mercat unſupported*, the Law preſumes that the *Maker* was *reconvalaſced*, but ſince the Law has fixt upon *Kirk* and *Mercat*, as open places, where the diſponer may be ſeen by all men, and by unſuſpect witneſſes; *equivalent acts*, as going to *make viſits*, though at a greater diſtance

Part 3. Tit. 7.

ſtance will not be *ſuſtained*; and ſo the *deeds reconvalaſce* with him; But though a man cannot grant a *new right* upon *Death-bed*; yet he may perfect an *old right*; or do a *deed* to which he might have been otherwayes compelled; as for payment of his *debt*, or may grant a *rational Joynter* to his *Wife*; though he cannot grant *proviſions* to his *Children* in that Condition.

Title

Title VIII.

Of Succeſſion in Moveables.

THE ſame Rules are obſerved, in the *Succeſſion of Moveables*, that were formerly ſpecified in the *Succeſſion of* Heritage; except as to theſe particulars, *viz. all of one Degree ſucceed equally*; and ſo amongſt *Brothers* and *Siſters*, the *Elder ſeclude* not the *Younger*; nor *Males* the *Females*, as in *heritage*; and in *moveables*, there is no *right of Repreſentation* as in *heritage*; and therefore if there be a *Brother* and two *Siſters* alive; and a third *Siſters Children*, the *Brothers* and *Siſters*, who are living

Part 3. Tit. 8.

will *ſucceed equally*, excluding the *Children of the Siſter* who is dead.

The *Executor*, is alſo onely lyable, according to the *value of the Defunct's eſtate*; Becauſe, he gives up an *inventary of his goods*; but an Heir is lyable *for all the Defunct's debts.*

Inventary

A Teſtament, or *Latter will*, does require to be in *Write*, for *nuncupative Teſtaments*, which were ſo called, in the *Civil Law*; (Becauſe, the *Defunct* named his *heirs* without *Write*) are not allowed by *Our Law*, by which a *Teſtament* muſt either be *holograph*, all written with the *Defunct's* own hand; or at leaſt, ſubſcrived by him before two Witneſſes, if he can *Write*; or if he cannot *Write*, by a *Notar*, or *Miniſter* and two *witneſſes.*

Teſtaments.

No

No *Heritable Right* can be left in *Teſtaments*, though the *Teſtator* was in *leidge pouſtie*, and perfect health; and though the *Teſtaments* be made in other *Nations*, where *Heritage* may be diſponed by *teſtament*; yet it will not *tranſmit a right to Heritage* lying in *Scotland*; and yet a *Teſtament* made according to the *ſolemnities* of theſe *Nations*, will be valid in *Scotland*; for though they may *regulate us as to ſolemnities*; yet they cannot alter the nature, and ſo not the tranſmiſſion of our *Rights*. Part 3. Tit. 8.

A *Legacy*, is a *donation left by the Defunct in any Write to be payed by his Executor*; But if the *Legatar* die before the *Teſtator*; or before the condition is *fulfilled*, on which the *Legacy was left*, then the *Legacy* evaniſheth Legacy

Part 3. Tit. 8.

niſheth; and though neither other mens moveables, nor a mans own *heritable rights*, can be left in *Legacy*; yet ſuch *Legacies* are valid, if the *Teſtator* knew that the ſum *left* was heritable, or belonged to others; and the *Executor* in thoſe caſes muſt pay the value.

A *Minor* being above 14. years, may make a *Teſtament*, without the *conſent of his Curators*; but under 14. years he can make none. A *Wife* may make a *Teſtament* without the *conſent of her Husband*. And a perſon *interdicted* without the conſent of the *Interdictors*; but *Idiots*, nor *furious perſons*; can make none; except in their *lucid intervals*; nor *Baſtards*, except they be *Legittimated*, or have Children of their own.

If a Man be *Married*, the *Wife*

Wife has without *paction*, *a ſhare in his Moveables*, of which he cannot *defraud her by his teſtament*; and this is called, *jus relictæ*; and if there be *Children*, the *Law* has provided *a portion of the Moveables, for them*; which is therefore called *their legittim*; and of which their *Father* cannot prejudge them by his *teſtament*; but there is no *legittim* due by the *Mothers death*; nor have *Children* who are *foris familiat*; that is to ſay, *who are married, and have renounced their portion natural*; any *Legittim* due to them. Part 3. Tit. 8. Jus relictæ.

This *Legittim* is alſo due only to the *immediat Children*, but not to *Grand Children*. Legittim.

The Remander of the *Defuncts Moveables*, beſide what is due to the Relict, and

Part 3. Title 8

Children, is called the *deads part*; and upon that onely he can diſpone.

If a Man have no *Wife*, nor *Bairns*, all is the *deads part* and may be diſponed by him; If there be either *Wife*, or *Bairns*, and not both; then the *Defuncts Teſtament* receives a *bipartite diviſion*; but if there be both *Wife* and *Bairns*, then it receives a *tripartite diviſion*.

Deads part

By the *Civil Law*, a *Teſtament* was *null*, if the *heir* was not named; but with us a *Teſtament* is *valid*, though the *executor* be not named, who is the *heir in mobilibus*, and is called *executor*; becauſe he *executes and performs the Defuncts will*, and for executing thereof the *Law* allows him the *third of the deads part*, if he be

Executor.

be a Stranger; but if the neareſt of kin confirm, he has right to the whole deads part; except the whole be *exhauſted by legacies*, and the *ſuperplus* over what is left in *legacy*, and the *third due* to the *Executor* for his *Office*, belongs alſo to the *Children*, and they may call the *Executor* alſo to an account for it *; but the *Heir* has no *ſhare* in the *Moveables*; except he *collate*, that is to ſay, (*be content that the reſt of the Children ſhare equally with him, in all that he can ſucceed to as Heir*;) or in caſe there be but one *Child*; for then that *Child* is both *Heir* and *Executor* without *Collation*.

Part 3. Tit. 8.

*K. J. 6. Par. 22. Act 14. Colation.

An *Executor Nominate, is he who is named by the Defunct in his Teſtament*; And is there-

Exec. Nominate.

Part 3. Tit. 8.

fore likewiſe called an *Executor Teſtamentar*; but if there be none named by the *Defunct*, then the *Commiſſar* will make an *Executor dative*; and ordinarly they prefer the neareſt *of kin*; but if the neareſt *of kin* being charged, will not *confirme*, then they name their own *Procurator Fiſcal Executor*; and if thereafter, the *neareſt of kin* compear, they uſe to *ſurrogat him*, and this is called, an *Executor ſurrogat*; But no *Executor Dative* has a *third* of the *Defuncts third*, as others have.

Execut. Dative.

A *Creditor* may confirm himſelf *Executor Creditor*; and ſo may purſue the *Defuncts Debitors*, and leaſt that *Creditors* ſhould wrong one another by *nimious diligence*, *Our Law* has appointed, that all who

Executor Creditor.

who ſhall confirm themſelves *Executors Creditors*, or ſhal do diligence againſt *Executors*, or *Intromitters* *within 6. Moneths one of another ſhall come in *pari paſſu*. Part 3. Tit. 8.

* Act of Sed. 18. Feb. 1662.

Executors Creditors are onely obliged to confirm as much as may *pay themſelves*; and are for the ſame reaſon, *only liable to do diligence for what they did confirm.*

Becauſe *Moveables* may be eaſily concealed from *Creditors* or diſſipated, therefore the *Law* appoints, *that the Executor ſhall upon Oath give up Inventar, and find Caution to make theſe moveables forthcoming*; And then the *Commiſſar* confirms him; nor can he *purſue*, or *diſpone* as *Executor*, till he be confirmed: he is onely lyable for the *Defuncts debt*, in as far as the goods confirmed will extend.

Part 3. Tit. 8.

Executory being a meer Office, it accreſſes to the *Survivers*; if there be moe *Executors*, and in ſo far as the *Executors* have not execute the *Teſtament* in their own *Lifetime*; that is to ſay, *have not obtained Decreets for the goods belonging to the Defunct*; there will be place for a new *Executor*, for executing theſe; and they are called, *Executors quoad non executa*; or if the *Executor* ommit to give up any thing in the *Inventar*; or do not give up the ſaids *moveables* at the *full rates*; there will be another *Executor Dative* made by the *Commiſſar*, who is called, *an Executor Dative ad ommiſſa, vel male appretiata.*

The *Executor* onely has *power of Adminiſtration*; and the *Creditors* and *Legators* can only

onely purſue him; except where there is a *ſpecial Legacy left of ſuch a particular thing*, or a ſum owing to ſuch a *particular perſon*; For then the ſpecial *Legator* has the *dominium* tranſmitted to him, and ſo he may himſelf purſue for his ſpecial *Legacy*; but the *Executor* muſt be ſtill called in the purſute, to the end it may be known, *whether the Debts exhauſt the ſpecial Legacies*; For, no *Legacy* can be payed, till the Debts be payed; and therefore, if all the *Legacies* cannot be payed, the *Legators* ſuffers a *proportional defalcation for payment thereof*; but if there be as much *free goods*, as will pay the ſpecial *Legacy*, it will be *preferred*, without *defalcation.*

Special Legacy

An *Executor* cannot diſpone, till

Part 3. Tit. 8.

till he obtain a *ſentence*, but even the ſentence ſtates him not in the *abſolute right of the moveables*; otherwayes than that he may *diſcharge* and *aſſign* to the *reſpective perſons* having intereſt; For, if he were *denounced Rebel*, the *Executory goods*, even after ſentence, would not fall under his *Eſcheate*, nor would his *Executors*, or his *Creditors* have *right* thereto, in prejudice of the *neareſt of kin* of the *Defunct*, to whom he was *Executor*.

Co-Execut.

If there be moe *Executors*, whom we call *Co-Executors*; one cannot purſue without the reſt, *for all of them repreſent* the *Defunct* only as one *perſon*; but if any of the reſt will not *concurr*, they may be *excluded from their Office*, by a *proceſs* before the *Commiſſars*; nor can

can an *Executor* for the ſame reaſon *diſcharge a debt* wholly, ſince the reſt have an *equal ſhare* in each debt: but if the other *Executors* have got as much as their *ſhare* will extend to, the *diſcharge* even from one of the *Executors* will be ſufficient; nor are (for the ſame reaſon) *Co-Executors* lyable for the *whole debt*, and ſo cannot be *ſinglely purſued*, unleſs they have *intromitted* with as much; as may pay the debt purſued for. Par: 3. Tit. 8.

An *Executor* is lyable to do *diligence* for recovering the *debts* due to the *Defunct*; and the *diligence* required upon his part, is a *ſentence*, and *Regiſtrated horning againſt the defuncts debitors*; but if there be an *univerſal*, or *ſpecial legatar*, whereby an *Executor confirmed* has Diligence of Exe:

Part 3. Tit. 8.

has no advantage; then the *Executor* is not lyable in *diligence*; but only to *aſſign* the *Creditors* that they themſelves may purſue.

The *Executor* likewiſe cannot *pay any debt* without *ſentence*, leaſt otherwayes he might *prefer one Creditor to another*; but yet the *Executor* may pay thoſe *debts*, that are acknowledged in *Teſtament* without *Proceſs*, providing the ſame be payed before the *Creditors intent a perſute*; or theſe which we call *priviledged debts*; becauſe they are *preferred* to all others, *viz. ſervants fies*, *medicaments* on *death-bed*, *houſe-meal*, and *funeral-expenſes*.

Prvil. Debts.

After the *Executors* have executed the whole *Teſtament*, they may get a *Decreet of Exoneration*

neration before the *Commiſſars*, againſt the *Creditors*, and all having *intereſt*; wherein they may prove that all they got is *exhauſted by lawful ſentences*; but it is not neceſſar to have ſuch a *decreet* when they are purſued before the *Lords*, for it is ſufficient when they are purſued there to alledge, *that they are exhauſted by way of Exception.* Part 3. Tit. 8. Decreet of Exoneration.

If any Perſon *intromit* with the *Defuncts moveables*, without being *confirmed*, they are lyable to the *Defuncts whole debts*; whether they were related to himor no;and though their *intromiſſion* was very ſmall; and this was introduced to prevent the *fraudulent*, and *clandeſtine abſtracting of the Defuncts moveables, without inventary in prejudice of Creditors*; and there- Vitious Intromiſſion.

Part 3. Tit. 7.

therefore this *paſsive title* is only introduced, in *favours of Creditors*; but of none others, ſuch as *Legatars Bairns*, *&c.* But if the *intromitter confirme*, before any *Action* be intented, this purges the *Vitious intromiſsion*; and the *intromitter* is only lyable for the *value of the thing intromitted with*; or if there be an *Executor confirmed*, no Perſon can be purſued as *Vitious Intromitter*; for the *Intromitter* then is only lyable to the *Executor*; But the *Relict*, or the *Defuncts Children*, confirming within *year* and *day* after the *Defuncts* death, does thereby purge the *vitioſity*; though they confirm not till *after citation*; nor will neceſſar Intromiſsion infer *vitioſitie*, and that is called, *neceſſar intro-*

tromiſſion, when either the *Huſband* or the *Wife*, continue their poſſeſſion of one anothers Goods, after one anothers *deceaſe*, for preſervation; and that becauſe there is no other perſon to look after them; and this is for the *advantage of the Creditors*; ſince it hinders the Goods from periſhing.

If there be moe *vitious Intromitters*, they are each lyable *in ſolidum*, if they be purſued in ſeveral *Actions*; and *pro virili*, if they be purſued together, but none of them get *Relief*, *for wrong in our Law has no warrant.*

The *Heir* is obliged to relieve the *Executor*, of all *heritable debts*; and the *Executor* is bound to *relieve the Heir*, *of all moveable debts*, as far as the *Inventar* will reach. *Title*

Relief, &c.

Title IX.

Of laſt Heirs, and Baſtards.

WHilſt there is any alive, who can *prove even the remoteſt contingencie of blood to the Defunct*, they ſucceed to him; but if there be none, the *King* ſucceeds as *laſt Heir*; for *quod nullius eſt, eſt Domini Regis*; and ſo the *King* ſucceeds to the *Defunct*, as laſt *Heir*; both in *Heritage* and *Moveables*; and is preferred to all *Superiours*, and others whatſoever; for which end he makes a *Donatar*, who muſt obtain a *Declarator before the Lords*

ultimus hæres.

Lords of Seſſion, againſt all who are ſuppoſed to have any *Relation*, whereupon a *Decreet* being obtianed *before the Lords*, declaring *that the King has right as laſt Heir*, , the *Defunct* having dyed, without any Relation. This *Decreet* is equivalent to a *ſervice*; but if lands be taken by a man to himſelf, and his *Heirs Male* ſimply; the *King* will ſucceed as laſt *Heir*; if there be no *Heirs Male*; though there be *Heirs Female*; ſince the land was not provided to them; and therefore men ordinarly in their *tailzies adject* the Clauſe *whilks failzing* to their *Heirs whatſomeever*. Part 3. Tit. 9.

Becauſe the *King* ſucceeds here as *Heir*; therefore he is lyable to pay the *Defuncts debts*; but he is only lyable as farr as

Part 3. Tit. 7.

as the *Estate will extend*; and therefore the *Creditors* may adjudge the *Real Estate*, and serve themselves *Executors Creditors* in the *Moveables*.

Bastardy.

A *Bastard* by *Our Law* has neither *Heirs* nor *Executors*; but yet he may *dispone* upon either his *Heritage or Moveables inter vivos*; though he cannot make a *Testament*; except he be *legitimated* by a *letter* under *the Great Seal*, (which extends not to *Heritage*) or have *Children* surviving him; for the *Bastards Children* will allwayes *seclude the King*.

The *King* in the case *of Bastardy*, makes a *Donatar*, who pursues *Declarator*; and is lyable to the *debt*; for in effect the *King* succeeds here, *quasi ultimus hæres*, and *Creditors* use the same execution in this case, as in the other

other; and in both *ultimus hæres*; and *Baſtardy*, the *Relict* has ſtill her ſhare of the *Moveables*, as in other caſes. Part 4. Tit. 1.

Children *procreate* betwixt perſons divorced; and theſe with whom they have committed *Adultery* can not ſucceed to them *. *K. J. 6 par. 16. Act 20.

Part Fourth.

Title I.

Of ACTIONS.

Actions

HAving finiſhed theſe two *firſt parts* of the *Law*, which treat of *Perſons* and *Rights*; We come now to treat of the *third part*, *viz. Actions*, whereby theſe *Perſons*, purſue thoſe *Rights*.

An *Action* is defined to be a *Right of proſecuting in Judgement what is due to us*; And it ſuffers very

very many *Diviſions*; the firſt whereof is, that ſome are *Real*, and ſome *Perſonal*; *A Perſonal Action*, is, *that whereby we only can purſue the perſon that is obliged to us*; as where I purſue a Man for payment of a ſum due by his Bond. A *Real Action* is, *that whereby a Man purſues his Right againſt all ſingular Succeſſors, as well as the perſon who was firſt obliged*; As for inſtance, if one have an *Infeftiment of Annualrent*, he can not onely purſue the *Granter* for payment of the Money, by a *Perſonal Action*, but he can by a *Real Action*, called, *an Action for poinding of the ground*, purſue all *ſingular Succeſſors*, and poind the Tennents, and Intromitters with the Rent, for recovering of his *annualrent* out of the land, that

Part 4. Tit, 1.

Real & Perſonall Actions

Part 4. Tit. 1.

ſtood affected with his *Infeftment of annualrent.*

Actions are alſo divided in *ordinary actions*, and *actions reſciſſory*; For with us all Actions, are called, *ordinary actions*; except *Improbations*, whereby we purſue *papers to be declared False and Forged*; or *Reductions, whereby we purſue Rights to be declared null, and to be reduced.*

Improbation. Reduction.

In *Improbations*, there are two Terms given to produce the *Write*; becauſe the danger is great; And if the *Writer* and *Witneſſes* of, and in that Write be alive, *their teſtimonies are onely allowed as probation*; which is called, *the direct manner of Improbation*; But, if theſe be dead, the *Lords* try the Verity of the *Write by ſtrong preſumptions and conjectures*; which is called

Terms of Imp.

Direct Manner of Imp.

called the *indirect manner of Improbation*: But becauſe in *Reductions*, the Write called for, is onely to be declared *null, till it be produced*; therefore, there is onely *one terme granted for producing*. Part 3. Tit. 10. Indirect Manner of Imp.

No *certification* will be granted againſt any Writes, made by the *Purſuer* and his *Predeceſſors* and *Authors*; except he be *ſerved heir* to theſe *Predeceſſors*, and *produce a right made by theſe Authors*: But *certification* will be granted againſt any *Rights* made to the *Defenders*, or their *Predeceſſors*, to whom they may ſucceed *jure ſanguinis*, or to their *Authors*, or any to whom theſe *Authors* may ſucceed *jure ſanguinis*; if any perſon be called to *repreſent theſe Authors*. Certif. in Imp.

The ordinary *Reductions* are

Part 4. Tit. 1.

ex capite Inhibitionis, whereby *we purſue Rights to be declared null as granted after Inhibition is raiſed by us*; or *ex capite interdictionis* if granted after *Interdiction* is raiſed by us; or *ex capite vis & metus*, *if* the *rights* were *extorted* from us by force; or *ex capite fraudis*, if the *rights* were *elicit from us* by *circumvention*, in both which laſt the Purſuer muſt lybell the *Qualifications*, or *Circumſtances* from which the force or fraud are inferred; or *ex capite lecti*, if the deeds were done upon *death-bed*, in prejudice of an *appearand Heir*; or upon the *Act of Parliament* 1621 *, if the deeds were done in *prejudice of prior lawfull Creditors*, in *favours of conjunct* or *confident perſon*; that is to ſay, *Relations*, or *Truſties*, without an *onerous cauſe*, or to a *Creditors*

*K. J. 6. Par. 23. Act 18.

ditor, though for an *onerous cauſe*, in prejudice of another who had done *prior diligence*, that was *habile to affect the ſubject diſponed*; all which, and many others *of that Nature* are oppoſed to *ordinary actions*; becauſe, they are *extraordinary remedies* invented by Law, for the *preſervation of mens Rights*, and are called *extraordinary*; becauſe they are never *competent*, till other *ordinary remedies fail.* Part 4. Tit. 1.

Actions *of Reprobatour*, and *Errour* are in effect *Reductions*; and muſt have the concourſe of the *Kings Advocate*; In the firſt whereof, a party againſt whom witneſſes *have deponed unjuſtly*; craves, the Decreet *pronounced upon theſe Depoſitions to be reduced*; becauſe the Witneſſes have deponed *faſly*, *circa initialia teſti-* Reprobatour.

Part 4. Tit. 1. *ſtimoniorum* ; and condeſcends in his *Reaſons of Reduction*, upon the particulars wherein they have deponed falſly ; and alſo concludes, *that the teſtimonies ſhould be reprobated.*

Summonds of Error

In the ſummonds of Error ; the Purſuer craves, *that a ſervice (whereby the Defender is ſerved heir to ſuch a man)* ought to be reduced; becauſe the Purſuer is a *nearer relation to the defunct.* than the perſon wrongouſly ſerved; upon which he condeſcends; and therefore concludes, *that the ſervice, and all following thereupon may be reduced* ; And that it may be *found* , *that the Inqueſt who ſerved him heir have erred* ; and this is the only ſummonds that is drawn in *Latine* with us.

Act prejudicial.

Some Actions, are called *preparatory*, or *prejudiciall* actions

ons; because, *they must be discussed before other actions are competent*; as for instance, If I pursue for a sum, and the *Defender* raises an *improbation*, alledging the *write to be false*; the tryal of the *falshood*, must be first *discussed*; and so is *prejudicial* to the *action of payment.* Part 4. Tit. 1.

Exhibitions conclude, either meerly to *exhibit* the write, or the thing called for; and then it is only a *preparatory action*; such as *exhibitions ad deliberandum*; or else they conclude *delivery*; and in all *Exhibitions*, the ordinar terms lybelled, are that the *Defender had, has, or has Fraudfully put away the papers or things craved to be exhibite*; and therefore, he is not obliged to *exhibite*, except he had them Exhibitions.

Part 4. Tit. 1.

since the *citation*, or *fraudfully* put them away, to elude a *future citation.*

Actiones Bonæ fidei.

Some Actions are called, *Actiones, bonæ fidei*; in which *equitie* is followed, as *Actions upon Mandates, Depositations, Emption, Location, &c.* In which the *Judge* considers what in *equity is to be done* by one *party* to *another.*

Actiones stricti Juris.

And some *actions* are *stricti juris*; in which the *Judge* is to *follow the strict prescript of the Contract* upon which the Action is raised, as in a *Declarator of Redemption*, wherein the *pursuer* craves, *that it may be declared that he has lawfully redeemed the lands*, that were Wadseted; in which case the Judge must consider the very precise terms of the reversion, and that the lands were redeemed conform

conform to theſe terms; nor is *Equipollency Relevant* in theſe caſes.

Some Actions, are called *rei perſecutoriæ*, by which we purſue that *quod patrimonio noſtro abeſt*; which is commonly called, *dammage and intereſt*. Rei Perſecutoriæ

Some are called, *penal actions*; becauſe we *purſue not only for repetition, and real dammage, but for extraordinarie dammages, and reparation by way of penalty*; ſuch as are *ſpulzies*, *Actions for violent Profits*, *&c.* Penal.

Some Actions, are called *Arbitrary Actions*, *wherein the Judge is tyed to no particular Law*; *but proceeds ex nobili officio*, that is to ſay, according to what he ſees juſt and fit; as an Action *for proving of the Tenor of an evident*, wherein the Complainer lybels, *that he had* Arbitrary.

ſuch

Part 4. Tit: 1.

ſuch a paper, (of which he muſt lybel the *full tenor verbatim*,) *and that he loſt it by ſuch an accident*; *and therefore concludes*, *that the tenor may be proven by Witneſſes*, *and adminicles in write*, which he muſt libel; For, no *tenor* can be proven, without ſome *adminicles in write*: And generally, there being many things, with which the Law behooved to truſt the Diſcretion and Honeſty of the *Judge*, ſince all caſes could not be *Comprehended* under known *Laws*; it therefore inveſted the *Judge* with this eminent power, which is called, *nobile officium*, in oppoſition to that *officium ordinarium*, & *mercenarium*, wherein he is obliged to follow the *will of the Contracters* preciſely, & *hoc officium mercenarium Judex nun-*

quam

quam impertit niſi rogatus.

Part 4. Title 1.

Some Actions, are called, *Declarators*; becauſe the *Purſuer* concludes in them, that ſome ſpecial thing *ſhould be declared in his Favours*; and ordinarly, whereever the *King*, or any other *Superiour* grants a *gift*, he to whom it is granted purſues a Declarator, *craving*, *it may be found and declared, that the Caſuality gifted to him, has faln in the Superiours hands; and that he has right thereto, by vertue of the gift*: And thus *Declarators* muſt be raiſed upon *Eſcheats*, *Wards*, *Marriages*, *Nonentries*, *&c.* onely there needs no *Declarator upon a gift of Forefaulture*; And upon *gifts of Eſcheat*, they raiſe Actions, both of *general* and *ſpecial Declarator* in one ſummonds. In the *general*, the

Declarators.

Pur-

Part 4. Tit. 1.

Purſuer concludes, that it ſhould be *found and declared*, that the *Rebel was lawfully denounced to the horn*; and that thereby his Eſcheat fell in the *Superiours* hands: And in the *ſpecial*, he concludes, *that the Tennents of the Rebels* lands, whoſe Eſcheat is faln, may pay him the Meals and Duties, by *vertue of his gift, and Decreet of general Declarator.* But though this laſt Action be called, *an Action of ſpecial Declarator*; it is in effect but an *Action of Meals and Duties*: In other caſes alſo, where any thing is craved to be *Found* and *Declared*, as a right ariſing upon a ſpecial *matter of Fact*, for which no other Action can be found, that has a ſpecial name: *Lawiers* doe now cauſe raiſe *Actions of Declarator*; or at leaſt, cauſe adject

adject concluſions of *Declarator* to other Actions, ſuch as *Reductions, &c.* and theſe are the ſame with the *Actions in factum*, mentioned in the *Civil Law.* Part 4. Tit. 1.

Some Actions are called *Civil, wherein men proſecute their Civil Rights*; and ſome *Criminal, wherein Men proſecute crimes, ad vindictam publicam.* Civil Actions

For further clearing *of Actions*, and how they ought to be *lybelled*; I ſhall ſhortly explain the *nature of a ſummonds*; and ſhall ſet done ſome of thoſe *actions* which have *ſpecial names* and *concluſions.* Nature of a Summonds.

The chief parts of a *ſummonds*, are the *Purſuers intereſt*, that is to ſay, *the right ſtanding in his perſon*, whereby he has good intereſt to purſue the Action he has intented.

Secundo, That all the perſons

Part 4. Tit. 1.

ſons who ſhould be called as *Defenders*, be called in the *Summonds*, and ſince it is a *Relevant exception* againſt a ſummonds, that *all Perſons having intereſt are not called*; Therefore it follows clearly, that for the more ſecuritie it is fit to call all Perſons, who may be concerned in the *debate*.

Medium concludendi.

Tertio, The *medium concludendi*; that is to ſay, *the ground whereupon the Perſons called, are lyable to pay and perform what is craved.*

Will of the Summonds.

Quarto, After all this is *narrated*, the *King* in the *Summonds*, ſays, *Our Will is, &c.* that ye *cite ſuch and ſuch perſons, &c.* which is called, *the will of the Summonds*, and which will of the *Summonds* does comprehend, a *command* to the *Meſſenger*, to cite the *Defenders*

fenders; and expreſſes the number *of dayes*, upon which they are to be cited; and the places to which they are to be cited; and before whom they ſhould compear: *As alſo*, the *Concluſion* craved by the *purſuer*, each of which *ſummonds*, almoſt has it own ſpecial *Stile* and *Terms*; and by *Act of Parliament*, *Writters* are commanded not to alter the *Ancient Stile**. Part 4. Tit. 1. Concluſion. *K. J. 6. par. 10. Act. 13.

It is obſervable, that though the *matter of fact* be ordinarly narrated before the will of the ſummonds; yet *Summonſes of Reduction*, *Improbation*, *Transferrance*, *Spulzie*, and *Declarators of Nonentrie*; begin, at, *Our Will is*, *&c.* And then goes on to the intereſt of the purſuer, *&c.*

In

Part 4. *Tit.* 1.

Tranſumpts.

In a *Summonds* of *Tranſumpt*, the Purſuer (who in the ſummonds is alwayes called the *Complainer*) lybells, *that he has Right to the Lands whereof he craves the papers to be Tranſumed*; and that therefore it is neceſſar to him to have *Doubles*, and *tranſumpts of the rights*; and this is the purſuers *intereſt*; and that the *Defender* has theſe *Rights*, or is obliged to procure him *Tranſumpts*; And therefore concludes, that the *Defender* ſhould be obliged to *exhibite, and produce them*, to be *judicially Tranſumed*; and the *authentick Tranſumpts to be declared as ſufficient for the ſecurity of the Purſuer in the ſaids lands* as the *original writes* themſelves.

In a *Summonds of Multiple poind-*

poinding, the *Complainer* having narrated, that he is *troubled by ſuch and ſuch Perſons*, who do each of them *pretend Right* to a ſum, in which he is *lyable*; he therefore concludes againſt all of them, to *compear* to *hear* and *ſee the ſame tryed*; and the *Party* who *ſhall be found to have beſt Right* to be *preferred*; *and the* other Party to be *diſcharged from troubling and moleſting him in all time coming.*

Part 4. Tit. 1. Multiple Poyndings.

In a *Summonds of Tranſferrence*, the Complainer lybells that the *Defender is Heir to his Debitor*: And concludes, that the debt ſhould be *Tranſferred* in him *Paſſive as Heir*; and upon the other *Paſſive Titles*; and therefore, that *Letters and Executorials may be directed againſt*

Tranſferrence

Part 4. Tit. 1.

againſt him, *in the ſame manner as they might have been directed, uſed, and exeeuted againſt his Predeceſſors, before his deceaſs.*

Theſe *Transferrences* are uſed when there is an *Decreet* obtained, or *bond Regiſtrated* againſt the *Defunct* in his *lifetime*; but if the *Bond* was not *Regiſtrated*, then there is a *Summonds of Regiſtration* raiſed in which the purſuer concludes, that the *ſaid Bond ſhould be inſert and Regiſtrated in the Books of Council and Seſſion, to have the ſtrength of a Decreet; and Executorials to be direct thereupon in manner therein mentioned.*

Summonds of Regiſtration

In a *Summonds of prevento*; The Complainer narrates, that he having *raiſed letters of horning*, the ſame were *Suſpended*

Prevento.

ded upon moſt frivolous Reaſons, to a very long day; and therefore concludes, that the *Defender ſhould bring with him the ſaid Suſpenſion, the blank day of blank, prevento termino:* to *hear* and *ſee*, the ſame *called*, *reaſoned* and *diſcuſſed*, with *Certification*, that if he fail, the *Lords will cauſe call the Suſpenſion, upon a coppie, and admit Proteſtation therein*, and ordain *the letters to be put to furder execution.*

Advocation.

If an *Advocation* be raiſed to too long a day *of compearance*, there may be likewiſe a *Summonds of Prevento* raiſed thereof.

Contra: of Laborrows.

In a *Summonds of Contravention of Laborrows*; the purſuer lybells, that *A. B. became ſurty*, and *Laborrows* for *C. D.* that the Complainers, *Wife, Bairns, Men,*

Part 4. Tit. 1.

Men, Tennents, and *Servants, ſhould be harmeleſſe, and skaithleſſe in their Bodies, and lands, &c.* And then ſubſumes upon the prejudice done, notwithſtanding of the ſaid caution: And therefore concludes, that both the *Principal and Cautioner*, ſhould be *decerned* to have *contraveened* the ſaid *Act of Caution*, in manner foreſaid; and therethrow, that they *conjunctly* and *ſeverally have incurred the foreſaid pain, the one half to the King, and his Theſaurer, and the other half to the Complainer, as Party grieved.*

Declar: of Property.

In a *Declarator of property*, the Complainer narrates his *right* to the *lands*, and how long and after what manner, he and his Authors have been by

by themſelves, their Tennents, and others having *Right from them*, in the peaceable poſſeſſion of the ſaids *lands*; untill of late that he is moleſted, and troubled by the *Defender*; and therefore concludes that it ſhould be found and declared, that he has the ſole, good, and undoubted *Right*, and intereſt in and to the ſaids *Lands*; and that therefore the ſaid *Defender*, and his *Tennents, and Servants and others, of their cauſing, and commanding, ſhould be decerned, not to trouble, nor moleſt them for the future, in their peaceable poſſeſſioon, bruiking, and joyſing thereof.* Part 4. Tit. 1.

If the Complainer deſigns only to maintain his poſſeſſion; without bringing his propertie in contraverſie he raiſes

Part 4. Tit. 1.

a *Summonds of Moleſtation*; In which he only concludes, that *they ſhould deſiſt, and ceaſe from troubling and moleſting him in the peaceable poſſeſſion of his lands.*

Summonds of Moleſtation.

In a ſummonds *for poinding the ground*, the *Purſuer* narrates, that he ſtands *infeft*, and *ſeaſed* in an annualrent of to be uplifted, out of the lands of and therefore concludes againſt the Tennents of theſe lands; and the Heritor for his intereſt, to *hear and ſee Letters directed to Meſſengers at Armes, Sherriff in that part, to Fence, Arreſt, Appriſe, Compel, Poind, and Diſtrinzie the readieſt Goods and Geer, that are preſently upon the lands; and yearly and termly in time coming, during the not redemption of the annualrent.*

Poynding of the ground.

In a ſummons *of Spulzie*, the *King* commands *Meſſengers*, *&c.* (which is the ſtile of all Summonſes, which begin with, *Our Will is*,) to *Summond*, *Warne*, and *Charge* the *Defender*, to compear and anſwer at the inſtance of the *Purſuer* againſt whom the *ſpulzie* after ſpecified was committed; that is to ſay, the *Defenders for their Wrongous, Violent, and Maſterful coming by themſelves, and their ſervants, complices, and others in their name; of their cauſing, ſending, hounding out, command, reſet, aſſiſtance, and ratiabition, to the lands of upon the day of and for their Wrongous, Violent, and Maſterful ſpoilziation of the Goods* (to be condeſcended on) And then concludes, *that they ſhould pay the prices extending to*

Part 4. Tit. 1.

Spulzie

Part 3. Tit. 8.

and the profits, that the Complainer might have made of the ſaid Goods daily ſince the ſaid ſpulzia-tion, extending to &c.

Wakning.

In a Summons of *wakning* the Complainer after narrating that he had raiſed ſuch a Summonds, which he had ſuffered to lye over and ſleep for a year; (for there need no *wakning* if there was any *Judicial Act*, or Minute upon the Summonds within the year) and therefore concludes againſt all the Perſons cited in the firſt Summonds, to *hear* and *ſee* the *foreſaid action* called, *wakned, and begun, where it laſt left inſiſted into, and Juſtice Adminiſtrate therein, till the final deciſion of the cauſe.*

Furthcoming

A *Furthcoming* is that Action, wherein the Arreſter lybels

bells, that he having *raiſed* Part 4. Tit. 1.
letters of Arreſtment, he cauſed, *Meſſenger* lawfully *Fence*, and *Arreſt all debts owing by the Defender* to the *Debitor*, *to remain under Arreſtment*; *and to be made furthcoming to him*; and therefore concludes, that the *Defender* ſhould be *decerned to make furthcoming payment*, and *delivery* to the ſaid *Complainer*, *of the ſum of adebted, reſtand, owand* be him to the ſaid *Debitor*.

Breach of Arreſtment.

If notwithſtanding of the *Arreſtment*, the *Debitor* pay his own *Creditor*; there is an ſummons *for breaking of Arreſtment*, wherein after the Arreſtment, and payment is narrated, the Purſurer concludes, *that the Defender ſhould be decerned to have broken the Ar-*

Part 4. Tit. 1.

reſtment then ſtanding ; and not lawfully and duely looſed ; and therefore to be puniſhed in his perſon , and goods , conform to the Laws of the Realm, in example of others.

Though the *Accumulation of ſeveral actions into one lybell* was not allowed by the *Civil Law* ; yet it is allowed by Ours, in which we may not only purſue ſeveral perſons for ſeveral debts in one lybell which we call by a general name, *an actions againſt debitors* but we may likewiſe *accumulate ſeveral concluſions* , againſt one and the ſame perſon ; though they be *of different natures*; as *Reductions*, *Improbations*, and a *declarator of propertie*, and *actions of general* , and *ſpecial Declarator* ; in all which it is a general rule , *quot articuli tot libelli.*

Accumulation of Actions

But

But when many *actions* are competent, for one and the ſame thing, as if a *Meſſenger* be *deforced*, we may purſue the *Deforcer Criminally*; (which will infer *confiſcation of moveables, or civilly for payment of our debt*; and the purſuing of the one does not extinguiſh, or conſume the other; and either the *Criminal or Civil action* may be firſt purſued; and in the *concourſe of all actions*, if the actions which concurr have different *concluſions*, as in the foreſaid inſtance, where the *Criminal action of Deforcement* concludes *Confiſcation*, and the *Civil action* only *payment*; Though the *Defender* be *aſſolzied* in the *Criminal Proceſs*, yet he may be purſued *Civillie*, and the *deforcement referred to his oath.*

Concurſus actionum.

Deforcement.

Part 4. Title 2.

Title II.

Of PROBATION.

FOR underſtanding the *matter of Probation*, it is fit to know, that all *Probation* is either by *Write*, *by Oath*, or by *Witneſſes*.

Probation.

Probation by Write, has been formerly explained in the Title concerning *Obligations by write*.

By Write.

Probation by Oath, is when either the Partie or Judge; *referres any thing to the oath of the contrare partie*; *but regularly*, no mans *Right* can be taken away *by oath*; except he who has the *Right*, referr the ſame to the *adverſaries oath*; but when there is a *former probation* already adduced, the

By Oath.

Judge

Judge ſometimes gives an *oath of ſupplement*, which is ſo called, becauſe it is given to *ſupplie the Probation* already led. Part 4. Tit. 2.

An Oath of Calumnie, is that whereby either the Purſuer, or *Defender* is obliged to ſwear that the *purſute*, *defence*, *reply*, *&c.* are not *groundleſs*, and *unjuſt*, and this may be craved by either *Party*, at any time during the dependence; and if it be *refuſed*, the purſuer will have no *further action*; nor the *Defender* will not be *allowed to inſiſt any furder in that defence, Duply, &c.* whereon his *Oath of Calumny* is craved. Oath of Calumnie. K: J: 15 par: 9: act 12

An *Oath in Litem, is that which Law allows the Judge to deferr to him who is injured; for proving the quantities of the thing* Oath in Litem.

Part 4. Tit. 2.

wherein he is injured; V. G. If I purſue *Titius*, for having *brok up my trunk*; and I have proved that he *did break it up*: *the Judge will refer to my oath, what* I *had in the Trunk*; and this is allowed both *in odium* of him who commits the *injurie*; and leaſt the perſon *unjuſtly injured* ſhould loſs his *Right* for want of *Probation.*

A Qualified Oath.

A *qualified Oath*, is, *that whereby he to whoſe Oath any thing is referred*, *depones*, *not ſimply*; *but circumſtantially*; which we call to *depone with a quality*; *V. G.* if I purſue *Titius* for payment of 100. *lib.* which *he promiſed to pay*, *who compears*, and *depones*, *that he did indeed promiſe*; *but it is as true*, *that he allowed the Purſuer to intromit with goods belonging to the Deponent*, *equivalent to the ſums due by the pro-*

promiſe: with which accordingly he has intromitted: And thoſe qualified Oaths generally are admitted; if the quality be intrinſick, that is to ſay, *neceſſarly imployed in the nature of the thing*; As in the foreſaid inſtance.

But if the quality be *extrinſick*, it in effect reſolves in a defence, and ſo muſt be proven otherwayes, than *by the qualified oath*; as if a *debt be referred to a parties oath*, who depones, *that he acknowledges the debt, but that it is payed*; this will not be admitted as a *qualitie*, but is in effect a *defence* which muſt be proven, *otherwiſe than by his oath*.

Probations by witneſſes, having been allowed in all *caſes of old*, untill the falſeneſs *of men forced our Law-Givers, to*

Part 4. Tit. 2.

allow nothing above 100. *lib. to be proven without write, or oath, and promiſes, to be only proven by oath; this Probation by witneſſes* is therefore called, *probatio pro ut de jure*; and it is fit to know, that none within degrees *defendant*, that is to ſay, who are *Couſin germans*, or of *nearer Relations*, can be witneſſes; nor *Women*, nor *Tennents*, who have no *Tacks*, nor *perſons declared infamous*, nor *Domeſtick Servants*; nor ſuch as *may gain, or loſs by the cauſe*; nor ſuch as *have given partial counſel*; that is to ſay, *advice to raiſe or carry on the purſute*; or ſuch as have *told what they will depone*; which we call *prodere teſtimonium*; nor ſuch as *compear to depone without being cited*; whom the *Law* calls, *Teſtes ultronios*, and rejects them, *becauſe of their ſuſpected*

ſuſpected forewardneſs; All others except theſe may depone, and are called *habile witneſſes*: And if *habile witneſſes* refuſe to come when they are cited, there will be *firſt horning*, and then *caption directed againſt them*; which are called *firſt* and *ſecond diligences*, but their *eſcheates* will not fall upon that *horning*. Par: 4. Tit. 2.

Preſumption.

Preſumptions, are a kind of probation, and a *preſumption is defyned to be a ſtrong ground or argument, whereby a Judge has reaſon to think, or be convinced, that ſuch a thing is true*; and they are divided into *preſumptiones juris*, which though they be ſtrong, yet may be taken off by a *contrary probation*; as if a man threaten to *poyſon another*, if the perſon was thereafter *poyſoned*, it is preſumable that he was *poyſoned by the*

Part 4. Tit. 3.

the Threatner; and *preſumptiones juris & de jure*; *ubi lex conſtituit ſuper preſumpto*; and thus the Law preſumes, that an *ultronius* witneſs, who offers himſelf, is *partial*; and therefore Statutes upon that preſumption, that he ſhall not be received; and *againſt theſe preſumptions, no probation can be admitted.*

Title III.

Of Sentences and their Execution.

AFTER a *Decreet* is extracted, the *Obtainer thereof raiſes letters of horning thereon*; whereby the *party decerned* is charged to pay or fulfill the *will of the Decreet*; under the pain of *Rebellion*; and this *Decreet* can onely

only be *quarrelled by Reduction*, or *Suſpenſion*, in both which the reaſons whereupon it is quarrelled are ſet down; nor can a *Decreet of the Lords*, be taken away without *Reduction*; and if there has been a *Debate* in the *firſt inſtance*, (for ſo we call the *action before the Decreet*; as we call *Reduction* and *Suſpenſion* the *ſecond inſtance*;) then nothing that was *competent to have been proponed before the Decreet*, will be admitted but will be repelled, *as competent and omitted*; for elſe there ſhould be no end of *Debate*; but yet if any thing have newly *Emerged*; or has newly come to the *Parties knowledge*, theſe are and muſt be received, if he *depone*, that *he knew not the ſame formerly.*

The ordinar effect of a *Suſpenſion*

Part 4. Tit. 3.

penſion is to ſtop the Execution of Sentences for a time; And it is a *Summons*, wherein the *Party* alledged *injured* by a *Decreet*, does cite the Partie who has obtained the Decreet *before the Lords*, (for no *inferiour Court can Suſpend*,) to anſwer to the *Reaſons offered by him*, for *Suſpending Execution* upon that *Decreet*: Which *Summons* proceeds upon a *Bill*, wherein the *reaſons* are *repreſented to the Lords*; for though ſometimes, *the Lords ordains the reaſons to be debated upon the Bill*; yet ordinarly they ordain *letters of Suſpenſion* to be raiſed: If the *Decreets* be *in foro*, then the *Suſpenſion* muſt paſs by the whole *Lords* in time of *Seſſion*, and by three *Lords* in time of *Vaccance*; but other *Decreets* may be *Suſpended*

Suſpenſion.

pended by any one *Lord.*

Part 4. Tit. 3.

There are other reaſons allowed to be *inſiſted on beſide* theſe in the *Bill*, and theſe are called *eiked reaſons*, and a man may *ſuſpend* upon *new reaſons*, as oft as he pleaſes for *competent* and *omitted* is not received againſt *Suſpenſions.*

If the *Suſpenſion* be *called*, *diſcuſt*, and the *letters* found orderly *proceeded*, that is ordained to be put to *furder Execution:* Then Letters of Caption may be raiſed; whereby all the *Inferiour Judges* and *Magiſtrates*, are ordained to *concurr with the Meſſenger, in apprehending the Rebel, and putting him in priſon*; which if they refuſe: or if the *Priſoner* thereafter eſcape out of their *priſon*, *they are lyable to pay the debt*; *by*

Caption

Subſid: Action.

Part 4. Tit. 3.

by a *Subſidiarie action.*

Decreets are executed likewiſe by *Poinding*, and *Arreſtment* upon the *Warrand* in *the letters of horning*, which are fully treated in their proper places, *vide ſupra*, *Tit. Poinding*, and *Arreſtments. Tit.* 5. *Part* 3.

As to *execution of immoveable goods*, which is by *Compriſing* and *Adjudication*, the ſame is formerly treated, *Part* 2 *tit.* 12.

Ejectino. If the Decreet be, to *remove from lands*, then the Party decerned to *remove*, being denounced Rebel, for not removing; the *Sherriff*, or *Judge ordinar*, is charged to *eject*, *who comes to the land*, *and puts out the fire*, or *caſts out ſome of the pleniſhing*; But if a man continue to poſſeſs in *ſpight of all Law*, after he is legally ejected, the *Privy Council* will give *Letters of Fire and*

Letters of Fire and Sword.

and Sword, to the Party injured; Commiſſionating the *Sherriff*, and others whom he will name, to *diſpoſſeſs him by the Sword, to raiſe Fire, and uſe all other ſeverities*, for which the Commiſſion does *indemnifie them.* Part 4. Tit. 3.

If ſuch as have *debatable Rights*, chooſe rather an *amicable*, than a *Judicial deciſion*; they ſubſcrive a *Submiſſion to Arbiters*, and if they pleaſe, to an *overſman*, and another *blank* on the back of the *Submiſſion*; wherein they may fill in their *Decreet Arbitral:* And though it be free to theſe *Arbiters* to accept; yet if they once accept, the *Lords will grant Letters of Horning to force them to decide.* Decreets Arbitral.

Though theſe *Arbiters* are not tyed to the ſtrict *ſolemnities*

Part 4 Title 3

nities of Law, yet they muſt obſerve *material Juſtice*; and therefore, they muſt *adverti ſe Parties*, *that they may give in claimes* (for a *claime* to *Arbiters* is in place of *lybels to Judges*;) and muſt allow Terms to prove; And though Equity is to them a Rule, as Law is to other *Judges*; yet if either Party be *enormly leſed*, the *Lords* will ſuſpend and reduce their *Decreets*. If the *Submiſſion* bear no ſpecial day, betwixt and which they are tyed to *decide*, they muſt decide within a year of the *Submiſſion*; and if Witneſſes will not *voluntarly appear* before them, the *Lords* will upon a *Bill*, *grant letters of horning to force them to appear.*

Title

Title IV.

Of CRIMES.

CRIMES are either Private, where the injury is committed againſt private Perſons; or Publick, where it is committed immediately againſt the *Common-wealth*. Crimes.

Private Crimes, called alſo *delicta*, in the *Civil Law*, oblige the Committers to repair the Dammage, and Intereſt of the private Partie. Delicta

Crimes are in *Scotland* either puniſhed *capitally*, by death; or *pecunially*, by a certain fine; or

Part 4. Tit. 4.

or *Arbitrarly* at the diſcretion of the *Judge.*

Treaſon.

*K.J.2. par. 6. act 24.

K.C. 2 par. 1. Seſſ. 3. act 112.

*K.C. 2 par. 3. act 2.

*Par. 1. act 2.

*K.C. 2 par. 1. ſeſ. 1. act 4.

†K. J. 2 par. 12. act. 54.

K. J. 2. par. 6. act 24.

*K. J. 6. Par. 8. act 129. & 150.

Capitale Crimes are *Treaſon*, which is puniſhed *by forefaulture of life, lands, & goods.*

It is *Treaſon* in any man, to *Plot, contrive, or intend death, or deſtruction to the Kings Majeſty; or to lay any reſtraint upon his Royal Perſon; or to deprive, depoſe, or ſuſpend him*, or to endeavour the alteration or diverſion of the Succeſſion*; to Levy warr againſt the King, or any Commiſſionated by him; or to intyſe others to invade him*, to make Treaties, or Leagues with Forraign Princes; or amongſt themſelves without his conſent *. To riſe in fear of warr againſt the King; to raiſe a frey in his hoaſt†, to Aſſaile Caſtles where he reſides*; to impugne the Authority of*

of the three Eſtates; *to decline the Kings Authority*; *not to come out to the Kings Hoaſt*; or to deſert it *; to maintain or reſet *Treatours* ‡; to conceale *Treaſon*; to *counterfite the Kings coyne*; and to raiſe *wilfulfire* *; all which are *Species of high Treaſon*.

Part 4. Tit. 4.
*K.J.1. Par. 1. Act 4.
‡Act 97
Par. 7.
*K.J.5. Par. 3. Act 8.

We have a kind of *Treaſon* in *Scotland*, which we call *Statutory Treaſon*; becauſe it is meerly introduced by *ſtatute*, and not by *common Law*: *viz. Theft in landed men* ‡; becauſe of the danger of that kind of *theft*; *murder under truſt* *; as if one man ſhould *kill another*, when he invites him to his houſe; or a *Tutor* ſhould kill his *Pupill*; which becauſe of the *eaſineſs* and *attrociouſneſs* of the *Crime* is made *Treaſon*; *The fireing of Coals heughs** , *aſſaſſi-*

Stat: Treaſon.
‡K.J.6. Par. 11. Act 50.
*Ibid. Act 51.
*K.J.6. Par. 12. aſt 146.

Part 4. Tit. 4.

*K.C.2 Par. 3. Act 13. ‡K.J.6. Par. 11. Act 49. *K.J.6. Par. 12. act 120.

‡K.J.5. Par. 7. act 125 K.Ja.6, Par. 6. Act 69.

*K.C.2 Par. 1. Sess. 1. Act 22. *K.J.1. Par. 13. Act 137 and 14.

assassination;& the pursueing another for Treason without being able to prove it‡. All Jesuits, Seminary Priests, and traffecking Papists*; and all thieves, who take bonds from lealand honest men, for reentering when they please: All who purchase benefices at Rome; are guilty of Treason‡.

No Crime can be pursued against a man or his heirs, after his death; except that Treason which is committed against the Kings Person, or Commonwealth.

The other Capital crimes are Blasphemie, Mans slaughter, or Homicide; for all Homicide is Capital with us: except it be Casual*, or Homicide in self defence.

*Theft is punishable by death; but we call small theft pickery, and

and it is only puniſhable *arbitrarly* *.

Notour Adulterey, that is to ſay, where *there are Children of the Marriage: or where the adulterers converſe openly at bed and board*; *or being diſcharged by the Church to converſe, do continue to converſe is puniſhable by* *death; *but ſimple adultery is only puniſhable arbitrarly. Inceſt* *, *Buggery*, *Duells* †, *the invading of any of his Majeſties Officers, for doing his Majeſties ſervice**; *Forgery* †, *Witchcraft*, *and the conſulters of Witches**, *Sorners*, that is to ſay, *ſuch as maſterfully take Meat and Drink from the Kings People without payment*†: *All wilfull hearers of Maſs* *, *and conceallers of the ſame*; *Mutilation*†, which is the *diſabling of a mem-*

Part 4. Tit. 4.
*K. J: 3: Par: 7: Act 60.
*Q: M: Par: 9: Act 74:
K: Ja: 6: Par: 6. Act 105
†K: J: 6: Par: 1: Act 14:
*K: J: 6 p: 16: act 12:
†K: J: 6 par: 16: act 4:
*J: 5: p: 6: act 8:
†Q: M: act 22: par: 7:
†Q: M: p: 9:

act 73: †K: J: 1: par: 1: act 5: & 7: *K: J: act 71: *K: J: 6: p: 14: act 193: †K: J: 6: p: 3: p: 10: 6: a: 76:

ber

Part 4. Tit. 4.

ber, (though *de praxi*; this be ordinarly punished with an *arbitrary punishment*: Or the Authours of *infamous Lybells*, *Seditious Speeches*, *tending to sedition*; *the strickers of any Judge in judgement*; *mixers of Wine**, *and committers of hame-sucken*, *by which we understand the assaulting or beating any man in his house.*

*K.J.3. Par, 12. Act 89.

†K.J1. Par.1. act 19. *K.J.1. Par: 1: act 1: & Act 16: Par: 14: 2act:10

The *Crimes* to be *pecunially punished* are the *slayers of Red-fish* *, *killers of Daes*, *Deer*, *Roes*†; *destroyers of Bee-hyves*, *Fruit-trees*, *Green-wood*; *kindlers of Mure-burn*; *except in the Moneth of March*; *Steeping of Green-Lint in runing Waters*, *or Loches*; *such as are guiltie of abominable Oaths*; *and Furnication.*

Crimes to be *arbitrarly* punished at the discretion of the *Judge*, are *negligence in the*

Kings

Kings Judges and Officers *, *and ſuch as unjuſtly murmure againſt them* †; *breakers of the Kings protection* *; *the bringing home of erroneous Books* †; *and the troublers of Church-men*; *Crafts-men* * *who wrongouſly refuſe to fulfil the work which they have taken in hand*; *verbal injuries, and ſcandals, againſt private Parties.* Part 4. Tit. 4.

*K.J.2. Par. 14. act 76.

†K.J.5. Par. 7. act 104.

*K.J.1. Par. 11. act 134.

†K.J.6. Par. 7. act 106.

*K:J:1: Par: 5: act 80:

K:Ja:5: Par: 7: act 111:

It is fit to know, that no *puniſhment left arbitrary by the Law, to the diſcretion of the Judge*, can be by him *extended to death*; and that wherever the *Law appoints death* to be *inflicted*, the offenders *moveables fall to the King*; though the *Law* does not expreſs the ſame; and though the *ſentence* expreſs not the *confiſcation.*

There are other *Crimes*, whereof the puniſhment is not reduceable to any of theſe

Part 4 Tit. 4.

kinds; and thus *perjury*, and *Bigamie*, (which is a kind of *perjury*; becauſe, *a man who marries two wives breaks his Matrimonial oath*,) are puniſhable by *confiſcation* * *of all the Offenders Moveable Goods, Impriſonment, and Infamy.*

*Q. Ma Par. 5. Act 19.

Deforcers of Meſſengers, and breakers of arreſtment, are puniſhable by *confiſcation of all their Moveables* †; *Foreſtallers of Mercats* *, *by buying things before they be preſented to the Mercat*; *or before the Mercat be proclaimed*, *are puniſhable by Impriſonment*, and *Confiſcation of what is bought.*

†K. J. 6. Par. 7. Act 118

Par. 12. Act 150

*Ibid. Act 148

Ocker, or *Uſury* *, which is *the taking more than the annualrent allowed*; *or the taking annualrent before the term of payment*; is puniſhed by loſs of the *principal ſum*; for the *Debitor* is to be

*K. J. 6: Par. 11. Act 52.

Par. 14. Act 222

Par. 15. Act 257

be free from the *Obligation*, and the *write being reduced, the ſum belongs to His MAJESTIE.* Part 4. Tit. 4.

Stellionat or the making *of double Rights; is puniſhed by infamy**; *and their perſons are at the Kings will.* *K. J. 5. Par. 7. Act 15.

The *Keepers* of Victual to a dearth, are puniſhable as * *Ockerers*; and by the *Civil Law*, *per leg: Jul: de Annona.* Bribing of *Judges* is puniſhable by *infamy* and *deprivation*; *Plagium* or the *ſtealling of men*, is a particular *Crime* by the *Civil Law*; but is a *ſpecies of theft* with us. And *Theft-boot which is the ſaving a thief by fyning with him, is puniſhable as theft* *. *Baratrie*, or the *obtaining beneſices from Rome*, is puniſhable by ‡ *baniſhment* and *infamy*. *Ambitus*, or *the obtaining offices by unjuſt means*, is not puniſhable under *Monarchie*. K: Ja. 6. Par. 12. Act 141 *K. J. 2. Par. 6. Act 22. K. Ja. 6. Par. 6. act 93. *K. J. 6. par. 13. act 137. ‡K. J. 6. Par. 1. act 2. Par. 6. act 72

Part 4. Tit. 4.

The puniſhment of *Crimes* is taken off either by *Remiſſions*, which muſt paſs the *Great Seal*; and muſt expreſs the *greateſt Crime* †, for which the *Remiſſion is granted:* Or by *Indemnities*, which is a *General Remiſſion* granted by the *King* or *Parliament*; betwixt which two there is this difference, that the obtaining a *Remiſſion* does not free the obtainer, from * *aſſything the party*, that is to ſay, *from repairing his loſſes*; *ſince its preſumed the King does only diſcharge what belonged to him*, which is, *vindicta publica*; But not what is the intereſt of *private parties*, or *vindicta privata*; but becauſe all the people are repreſented in *Parliament:* the *King* and *Parliament* may by their *Indemnity*; diſcharge both the one and the other.

†K. J. 4 Par. 6. act 62.

*K. J. 2. Par. 14. act 74. K. Ja. 5. Par. 3. act 7.

He

He who founds on a *Remiſſion*, acknowledges the *Crime*; but he who founds on an *Indemnity* does not. Part 4. Tit. 4.

The *King* likewiſe reſtores men ſometime againſt *forefaultures*; which *Reſtitution* is either by *way of Juſtice, finding that the perſon was unjuſtly condemned*; and then the Perſon condemned is reſtored to all that ever he had; and he recovers not only his *fame*, but his *eſtate*; though *tranſmitted* to *third parties*. †*Or ſecundo*, the *Reſtitution* is *by way of grace* and meer *favour*; and then the partie condemned cannot recover, what was beſtowed by the *King* upon third parties; for the *King* cannot recall what was once Legally and Warrantably granted by him. †K. J. 6. Par. 18. Act 4.

F

I N I S.